Johannes Keiler and David Roef (eds.)

Comparative Concepts of Criminal Law

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COMPARATIVE CONCEPTS OF CRIMINAL LAW

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Edited by
Johannes Keiler
David Roef

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Sheraton House | Castle Park
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PREFACE

For the third edition of this handbook, we have revised and updated several chapters. This has been done so as to incorporate some important new legislative developments, case law and scholarly writing. The chapter on forms of participation has been substantially updated and revised and now incorporates the recent decision of the UK Supreme Court in *Jogee* (2016) with regard to joint criminal enterprise liability, as well as new German and Dutch case law. Similarly, the chapter on corporate criminal liability has been revised and now also discusses the issue of mens rea and corporate fault, amongst other issues. Minor amendments have moreover been made to the chapter on commission versus omission. Finally, we have added an entirely new chapter on principles of criminalisation and the limits of criminal law. Our aim was to offer students a concise introduction to the issue of criminalisation and to furthermore provide some insights into which societal developments, interests and values can influence the scope of modern criminal law. We hope that these amendments will provide the reader with an even fuller picture and analysis of certain doctrinal issues of the general part.

We acknowledge once again the great co-operation with Hans Kluwer of Intersentia Publishing, who was willing to publish this more extended third edition. We would also like to thank our colleagues in the criminal law department of Maastricht University and the many students who commented on the previous edition, especially Davide Muraro, who also assisted us with the editing of some chapters.

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LIST OF ABBREVIATIONS

AC	Appeals Cases
AG	Advocate General
All ER	All England Law Reports
appl. no.	application number
BayObLG	Bayerisches Oberstes Landesgericht
BeckRS	Beck-Rechtsprechung
BGH	Bundesgerichtshof
BGHSt	Bundesgerichtshof's Official Gazette, criminal cases
BVerfG(E)	(Decision of the) Bundesverfassungsgericht
CLR	Commonwealth Law Reports
CPS	Crown Prosecution Service
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
DCC	Dutch Criminal Code
DPP	Director of Public Prosecutions
EC	European Communities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EU	European Union
EWCA	England & Wales Court of Appeal
EWCA Crim	England & Wales Court of Appeal (Criminal Division) Decisions
EWHC	England & Wales High Court
GCC	German Criminal Code
HR	Hoge Raad
JA	Juristische Arbeitsblätter
JR	Juristische Rundschau
Jura	Juristische Ausbildung
JuS	Juristische Schulung
JZ	Juristenzeitung
KB	King's Bench
LJ(J)	Lord Justice(s) of Appeal
MDR	Monatsschrift für Deutsches Recht

MPC	Metropolitan Police Commissioner
NbSr	Nieuwsbrief Strafrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
(N)JW	(Neue) Juristische Wochenschrift
NJOZ	Neue Juristische Online Zeitschrift
NStZ(-RR)	Neue Zeitschrift für Strafrecht (-Rechtsprechungsreport)
OLG	Oberlandesgericht
OWiG	Ordnungswidrigkeitengesetz
QB(D)	Queen's Bench (Division)
R	Regina
Rb.	Rechtbank
Re	Regarding (ablative of *res*)
RG	Reichsgericht
RGSt	Reichsgericht, criminal cases
StGB	Strafgesetzbuch
StV	Strafverteidiger
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
v	versus
WLR	Weekly Law Reports
ZRP	Zeitschrift für Rechtspolitik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

INTRODUCTION

Johannes KEILER and David ROEF

The handbook you are now holding is unique in the sense that it introduces law students to substantive criminal law in a comparative way and not just to the criminal law system of one specific jurisdiction. In this introduction we briefly explain the general purpose of the book, the educational value of a comparative approach, the choice of legal systems used, and the structure of the book. We also refer to some changing contours of modern criminal law that are frequently mentioned in the text and that allow us to better comprehend some recent legislative and judicial developments that seem to broaden the scope of criminal liability.

1. THE GENERAL PURPOSE OF THE BOOK

The primary purpose of this book is to identify and explain some fundamental concepts and rules of substantive criminal law, i.e. those concepts and rules that determine the scope of criminal liability. Our main object is therefore not a discussion of specific criminal offences, like a comparison of rape or arson between England and the Netherlands, but the fundamental rules that are generally applicable to most offences within a respective penal system. In civil law systems, like Germany and the Netherlands, these fundamental rules are often enshrined in the so-called 'general part' of their criminal code, while the 'special part' contains the definition of offences (murder, rape, theft, fraud). The general part thus consists of doctrines, rules and definitions that are in principle applicable to all offences.[1] It consists of generalisations about offences forming the special part of criminal law.[2] For example, if attempt is an issue in fraud, rape, and homicide cases alike then the contours of attempt are arguably better worked out in a general manner then for each specific offence separately. The same holds true for defences that may justify or excuse certain criminal behaviour, like self-defence, duress and insanity. Whether a person has committed arson, manslaughter or bodily assault, a mental disorder may be an excuse in all these instances.

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[1] R.A. Duff, 'Answering for Crime' (Hart Publishing 2007), p. 3.

[2] D. Husak, 'Overcriminalization' (Oxford University Press 2008), p. 65.

In any case, in most legal systems, including the common law systems that do not have a criminal code as such, the general part contains inter alia the following doctrines. First, the basic building blocks of criminal liability, i.e. actus reus and mens rea, furthermore, generally applicable defences (justifications, excuses) as well as subsidiary forms of liability, expanding the scope of the law, such as participation and inchoate liability. These doctrines apply across the board to all offences and also contain general maxims of criminal justice which warrants their analysis and discussion in isolation from the specific offences to which they apply. In each chapter the focus is on a specific doctrine that is necessary to determine the scope of criminal liability.

Arguably criminal law has two main functions which require delicate balancing. On the one hand it is a tool to control deviant social behaviour; on the other hand its function is to canalise and circumscribe the application of coercive measures and punishment in legally determined channels. In other words, it lays down the rules under which the state can exercise its powers and thereby protects the citizen from arbitrary state measures. Thus, criminal law on the one hand *polices society*, being an instrument of the state against its citizens to control crime, and on the other hand it *polices the police*, safeguarding the citizens against repressive state powers. No legitimate approach to criminal law can ignore this dual function of criminal law. Accordingly this handbook also uses the structural tension between instrumentality (sword) and legal protection (shield) as both a starting point and a critical frame of reference. This allows students to better understand the possible pros and cons of certain developments within a certain system.

2. A COMPARATIVE APPROACH

Although every (European) country has its own legal culture, and its own criminal law, each system has to deal with similar topics and challenges. It is therefore interesting to cross borders to see what kind of solutions other legal systems have to offer for present and future problems.[3] An important educational value of a comparative approach is that when we take a step back from the details of the different penal systems, we may find some interesting common principles, concepts and rules, but also some striking dissimilarities. In this book students are therefore invited to reflect on what George Fletcher has called the 'deep structure' or 'universal grammar' behind various European systems of criminal law.[4] One may then even discover that, without ignoring cultural differences and legal sensitivities, there is often a much greater similarity between diverse systems than we commonly realise.

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[3] See also: M. Dubber and T. Hörnle, 'Criminal law: a comparative approach' (Oxford University Press 2014).

The comparative methodology is however not a goal in itself but should be regarded as an explanatory tool for a better understanding of the basic concepts of criminal law. The comparison is meant to encourage students to critically reflect upon the different principles, ratios and values that underlie the foundations of criminal liability. For example, the chapter on attempt and preparatory acts will not just give a more or less detailed, classical textbook inventory of inchoate offences within the different systems. That would unnecessarily overshadow the main didactic purpose of the book, i.e. to explain what attempt and preparation are conceptually all about, how the applicable rules may have changed over the years, and what possible interests are at stake if a particular system chooses to go in one direction or the other. This also explains why we have chosen to sometimes quote quite elaborate passages from existing case law as this enables students not only to get a feeling of how judgments are formulated in a specific system, but also allows them to get acquainted with the legal arguments that underlie a specific judgment, especially when this points to an important change in the application of a certain concept or rule.

This book began not as a purely academic exercise. Although the chapters are largely based upon the scholarly research and writings of the authors,[5] the text is primarily the result of a practical need, i.e. to write an accessible handbook for students who want to understand criminal law in a comparative way. Most of the authors have some experience in teaching the Substantive Criminal Law course of the Maastricht European Law School (Maastricht University). This course aims to provide bachelors students of law, who come from different countries, with a basic knowledge of the substantive rules of criminal law. However, the main challenge for such a course is to find both accessible and relevant study materials that are not solely focused on one particular penal system. With the possible exception of Fletcher's *Basic Concepts of Criminal Law* (1998) and Dubber and Hörnle's *Criminal Law: A Comparative Approach* (2014) there is to date not one single European handbook that introduces substantive criminal law on a conceptual and at the same time comparative basis. There are different reasons for this. First, given the cultural differences between legal systems and the politically sensitive nature of criminal policy itself, a better understanding and harmonisation of substantive criminal law within the European Union is a delicate and slow process. Arguably this still influences and shapes the perceived (political and academic) need for comparative research of different criminal law systems within the EU, especially regarding the so-called general part.[6] Second, compared with other fields of law, like contract and property law, comparative research into the general concepts of substantive criminal law is quite a recent phenomenon within the academic field, never mind transmitting this knowledge to students of law. Most comparative academic writings are either on criminal procedure or are mainly focused on specific offences (like terrorism, drug offences, money laundering), simply because these aspects of criminal law happen to be a priority for the EU. This handbook tries therefore to fill in a legal educational gap by exploring the general concepts of substantive criminal law in a comparative way.

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[4] G.P. Fletcher, 'Basic concepts of criminal law' (Oxford University Press 1998), p. 5; see also: G.P. Fletcher, 'The grammar of criminal law' (Oxford University Press 2007).

[5] Especially the two following dissertations: J. Blomsma, '*Mens rea* and defences in European criminal law' (Intersentia 2012); J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013).

3. THE THREE PENAL SYSTEMS

In order to better understand and contextualise the concepts discussed in this book it seems pertinent to briefly introduce the investigated penal systems and to highlight some crucial characteristics. This will also help students to better place the doctrinal solutions and judicial styles into perspective.

The comparative approach of this book has been mainly confined to three different European systems, representing different legal traditions in Europe. The legal systems of investigation are England and Wales, Germany and the Netherlands. Comparative lawyers often draw a distinction between common and civil law traditions. While this distinction in the past was often thought to describe polar opposites it should not be overlooked that the ongoing 'Europeanisation' of the law in combination with the influence of the European Court of Justice and the European Court of Human Rights has brought the different traditions closer together.

In any case, the English penal system is often seen as a paradigm of the common law tradition and can even be described as 'the mother of all common law traditions'.[7] Traditionally, common law systems can be described as case law-based systems, while civil law systems are generally code-based systems. This means that in common law the foundation of the legal system can often not be found in a criminal code. The primary legal principles have rather historically been created by judges from case to case. Thus, the law developed organically from jurisprudence instead of being systematically created. This development is still visible nowadays in English law in the old common law crimes such as murder, which even now remains undefined by legislation. However, while this may have constituted the starting point of the English penal system, it should not be overlooked that in recent decades strong opposing tendencies had a considerable impact on the system. Parliamentary law-making gained a lot of ground, which has led to a significant increase in detailed and sometimes complex statutory law.

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[6] Cfr. A. Klip (ed.), 'Substantive Criminal Law of the European Union' (Maklu 2011).

[7] P. Darbyshire, 'Eddy & Darbyshire on the English Legal System' (Sweet & Maxwell 2001), p. 10.

The German penal system on the other hand can in many respects be seen as the exact opposite of the English common law system. As a representative of the civil law tradition the German system is a strict code-based system. And while Germany can certainly not be seen as the mother of all civil law traditions, it has nevertheless in the course of time proved very influential, especially with regard to criminal law. This is for instance demonstrated by the fact that countries like Japan or Greece adapted their penal systems along the lines of Germany. In contrast to common law, German law is concept-, not fact-driven. German legal theory is strongly influenced by systemic thinking and much scholarly attention is devoted to classification in order to increase the internal consistency and comprehensiveness of the law. Accordingly, German law sometimes tends towards a certain formalism. Certain differences in the substantive laws of England and Germany may furthermore be linked to the different trial modes, i.e. the adversarial and the inquisitorial systems, applied in the two countries.

Jurisprudence does play an important role in developing and shaping the law in Germany, especially if the judgments are handed down by the Supreme Court (BGH). However the role of case law is less significant and fundamental as is the case in the English system. The style of judicial reasoning in Germany can be described as deductive, as it tries to find solutions to the case at hand by deriving them from the general rules and principles contained in the criminal code. Conversely, judicial reasoning in common law countries such as England can generally be described as inductive, as attempts are made to derive general principles from the solutions found in individual cases.

The Dutch penal system constitutes a variation of the civil law traditions. During the French occupation of the country, Napoleon introduced the Code Pénal, and while some traces of the French judicial style are still discernible at present, the Netherlands have over time also been influenced by their neighbours, i.e. German doctrinal thinking. Effectively the Netherlands take a medium position between the English and the German penal system. Just like the German system it is a code-based system. However, it is less dogmatically driven and less formalistic than its German counterpart. In this aspect the Dutch system essentially resembles the English system, as the guiding maxims are often pragmatism and practicality, which may also explain why the doctrinal solutions are generally less complex and sophisticated than in Germany. This judicial pragmatism and focus on effectiveness is also reflected in jurisprudence, where a just and most importantly workable solution to the problem at hand is often considered more important than systematic coherency, while in Germany the situation often seems the reverse. To conclude, it can be stated that the Dutch penal system effectively takes a medium position between the highly systematic and complex German and the casuistic and result-orientated English system.

4. THE CHANGING CONTOURS OF CRIMINAL LAW

In recent years the contours of criminal law have been the subject of constant change. Crime is increasingly conceived in modern society as an omnipresent risk, which needs to be diligently managed and controlled. This societal change has often been discussed under the heading of 'the risk society'. This term describes a society in which not the distribution of 'goods' as in the traditional welfare state is central, but rather the distribution of 'bads', i.e. the prevention and compensation of risks. As the sociologist Ulrich Beck puts it, we are living on 'the volcano of civilisation', on a technological frontier which lies beyond our powers of conceptions and which creates an insecure future.[8] Accordingly, what citizens increasingly demand from their state is security. The pursuit of security in turn increasingly influences and drives the application of criminal law. As the criminologist David Garland aptly observes: 'Today, there is a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk. Protecting the public has become the dominant theme of penal policy'.[9] However, what is often overlooked is that security is an ideal and an inherently normative concept. It is the indefinite pursuit of the unattainable.

In any case, this emphasis on security has had a considerable impact on criminal law. On the one hand new risks have been identified which need to be addressed accordingly. The risks following from the conduct of corporations or from the development of new technologies such as the internet or diseases such as AIDS or Ebola are just some examples here. On the other hand criminal law has become more punitive partially as a result of the at least questionable assumption that higher penalties would exert an increased deterrent effect on citizens and in turn lead to a higher degree of diligence and security. The steady increase of punishment for intentional and negligent offences can serve as an example here. While especially the latter were traditionally seen as minor offences, in modern society the disregard of certain diligence standards often seems almost as deplorable as intentional wrongdoing.

Furthermore, as risks are by definition located in the future, the focus of criminal law has increasingly come to rest on the concept of crime prevention. Accordingly, the focus shifts more and more towards the reduction of criminal opportunities in everyday life. Multiple tools have been put in place to minimise the occurrence of criminal behaviour and to ensure that fewer crimes will end successfully. Thus, a temporal shift in perspective seems to have taken place, so that we are nowadays at times even more concerned with anticipating and

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[8] U. Beck, 'Risk Society – Towards a New Modernity' (SAGE Publications 1992), pp. 19–84.

[9] D. Garland, 'The Culture of Control – Crime and Social Order in Contemporary Society' (Oxford University Press 2006), p. 12.

forestalling future risks instead of responding to wrongs done. Moreover, the preoccupation of criminal law with individual offenders is increasingly substituted by the desire to identify and classify suspects and potentially dangerous segments of the population in order to manage the risk they collectively pose.

We have tried to highlight and discuss some of these developments throughout this book. In the case law discussed, some of these modern day developments will come to the fore. The debate on how to best deal with cases of intentional HIV infection, preparations to commit an offence or corporate manslaughter are just some issues that will be touched upon. However, our goal is not to analyse and discuss these new developments exhaustively, but rather to encourage students to reflect on them and the related new criminal policy challenges critically.

5. THE STRUCTURE OF THE BOOK

Keeping the general purpose of the book in mind, i.e. explaining the fundamental concepts and doctrines that determine criminal liability, its general structure is as follows.

Chapter I discusses different theories of punishment. Since punishment involves pain or deprivation of some fundamental rights (freedom), its intentional imposition by the state requires justification: what could justify a state in using criminal law to inflict burdensome sanctions upon its citizens when they violate certain legal rules? Due to its inherent painful character and far-reaching impact, punishment requires a solid legitimisation. This chapter introduces critically the traditional retributive and utilitarian theories of punishment. It also pays some attention to more recent penological developments, like the increasing focus on risk management and crime control, the position of the victim in criminal law and restorative justice.

Following the discussion of different theories of punishment, Chapter II explores the problem of criminalisation and the limits of criminal law. Arguably, it is not only criminal law's sanctioning mechanism that requires concrete justification, but also the policy of criminalisation itself. What are some of the positive reasons that justify criminalising certain kinds of unwanted behaviour, and what are the negative constraints that may limit the use of criminal law? This chapter introduces certain well-known principles and theories of criminalisation, such as the principle of individual autonomy, the harm principle, the theory of legal goods and the ultima ratio principle. As criminal policy is not a static affair, the chapter also looks at how the aforementioned societal developments that have changed the contours of criminal law have also strongly influenced debates about criminalisation.

Chapter III explains one of the cornerstone principles of criminal law, the so-called principle of legality, which has to be clearly understood before one can start discussing the fundamental conditions for determining criminal liability. This principle entails that an act can be considered criminal only when there is a pre-existing legal norm that criminalises this behaviour. The legality principle has been codified in many national codes, constitutions and international instruments, such as Article 7 of the European Convention of Human Rights. In this chapter the main focus will be on how the legality principle has changed over time and how the investigated countries have tried to incorporate these changes into their criminal law system.

Chapter IV introduces the two constituent elements of a criminal offence, i.e. the external element or actus reus and the mental element or mens rea. In order to incur criminal liability, a perpetrator generally needs to fulfil both the actus reus and mens rea of the respective crime. An important part of this chapter deals with the question of how these two elements are related to the general framework of criminal liability in common and civil law systems. While common law courts traditionally follow a bipartite structure, simply distinguishing between the objective and subjective aspects of crime, civil law systems have developed a tripartite framework for assessing criminal liability that allows for a more fine-grained differentiation between the wrongfulness and blameworthiness of a crime. From a comparative perspective, the question arises as to how the bipartite and tripartite structure can be reconciled.

The concept of actus reus is further explored in Chapter V where special heed is paid to the theory of conduct. All penal systems generally agree that the imposition of criminal liability requires at the very least some form of conduct, controlled by the perpetrator. Human conduct can however take different forms. Humans can bring about certain results by either taking positive steps to achieve a certain result or by failing to intervene and letting events run their course when the law would have demanded an intervention. In this chapter we will therefore discuss not only offences of commission, but also different kinds of criminal omissions. In regard to omission liability the concept of a duty of care is of pivotal importance and will therefore constitute the central aspect of the discussion.

Chapter VI will dwell on another important aspect of the actus reus, i.e. the doctrine of causation. This doctrine is crucial for actions and omissions alike. Its essential task is to distinguish human causes from mere accidents or natural events. The doctrine of causation reflects the prevalent individualistic stance in our society that no one should be convicted for a consequence s/he did not cause. Much attention will be given to different theories of causation and how these can offer us criteria for determining the necessary causal link between the perpetrator's conduct and the harmful result.

Having discussed the objective elements of an offence, Chapter VII will dwell on the different forms of mens rea with which a person needs to act in order for criminal liability to arise. The law distinguishes between different fault elements, such as intention and negligence, in order to distinguish relative degrees of culpability and punishment. From a comparative perspective it is especially interesting to see how common and civil law systems respond differently to situations of dangerous risk taking, i.e. where the perpetrator did not want the harmful consequences of his act, but still knew there was such a risk. An adequate protection of legal interests demands a fault element in between the most serious and the lowest degree of mens rea. It will become apparent that in the English system this element is known as recklessness, which encompasses less culpability than intention but more than negligence. In civil law systems, like Germany, dangerous risk taking is covered by broadening the traditional elements of intention and negligence.

Chapter VIII explores different liability-negating circumstances. Even if it is clear that a person's conduct fits the definition of an offence, the question may still arise whether he really ought to be held responsible for that offence. All legal systems provide certain circumstances (defences) that take away the criminal liability of the perpetrator. In general we distinguish between justifications that negate the wrongfulness of an act, and excuses that negate the blameworthiness of the agent. In this chapter we will discuss the liability-negating circumstances of self-defence, self-defence-excess, necessity, duress and insanity. Some attention will also be given to the problem of intoxication.

Chapter IX will dwell on inchoate liability. Traditionally, criminal law is primarily backward-looking and retributive by punishing prior wrongdoing. Yet over time the focus of criminal law has widened and the common consensus nowadays is that criminal law is not only able to respond to harm done, but also to reduce the risk of harm. For this reason all legal systems accept inchoate offences, whose purpose is rather preventive than retributive. A central feature of these offences is that they lack a concrete harm. In this chapter we will discuss two main forms of inchoate liability: the (more traditional) doctrine of attempt and the (relatively new category of) preparatory offences.

Chapters III–IX only focus on the paradigmatic case of a sole perpetrator who is both initiator and executioner of his criminal plans. However, the range of persons that could be involved in crime is often much broader. People frequently cooperate in one form or another in order to bring about a certain criminal result. Legal systems have therefore adopted different strategies and rules to respond to cooperative criminal efforts and to determine when and why accomplices to a crime ought to be held liable. In Chapter X we will explore this so-called law of complicity.

Finally, in Chapter XI, the focus of this book will turn to a very specific category of perpetrators, i.e. corporations. Corporations have become important members of our society and just like individual human beings (natural persons), corporations (legal persons) can also commit criminal offences, like environmental pollution, fraud or even manslaughter. However, there are different ways to look at corporate wrongdoing, depending on whether one decides to take the individual employee or the organisation as a whole as starting point for the attribution of criminal liability. In this chapter we will discuss how different systems try to construct attribution mechanisms for regulating corporate wrongdoing.

CHAPTER I

THEORIES OF PUNISHMENT

Jacques CLAESSEN

1. INTRODUCTION

Punishing offenders is, for most individuals, something logical, just and self-evident. Generally, they see retribution and/or prevention as the most important justifications and goals of punishment.[1] However, punishment is not as obvious in certain cases.

Take the example of SS officers and Nazi collaborators who evaded justice and were only tracked down decades after the end of World War II. The question that presents itself is whether someone should still be punished more than half a century after the crimes were committed. This example mainly concerns men who committed their crimes while they were young – in a context that was anything but ordinary. What would a criminal court in 2015 aim to achieve by punishing these individuals? Preventing the person from committing such a crime again seems to be an irrelevant goal. Could such a punishment discourage other people from committing similar crimes? The context in which these men committed their crimes is not likely to occur again in Western Europe. The primary goal of punishment, thus, seems to be retribution, i.e. they deserve their punishment because the crimes they committed are not yet atoned for. The 'debt' that they incurred during World War II is in fact only now being paid off. The question still remains whether the need for retribution does not in fact decrease as the years go by. Furthermore, does retribution still have meaning given that these offenders are now in the final stage of their lives? A life sentence will in their case only take away their freedom for a few years. By contrast, they have been able to live in relative peace and quiet for more than half a century. Some of them have not even felt actual remorse for their crimes. But what if an offender out of remorse (symbolically) repairs the harm committed as much as he can, henceforth lives an exemplary life and does a lot of good for society? Is retribution still so self-evident then?

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[1] See section 4 for a detailed exposition of the concepts of retribution and prevention.

Different examples can be given. What should be done with offenders who are imprisoned for life for very serious crimes such as double murder? Suppose that, as time passes, evidence is presented that several of these offenders have a new outlook on life and that research demonstrates that the risk of reoffending is low in their cases? What punishment goal is still served after twenty, thirty or forty years of imprisonment? Again, the primary goal of punishment seems to be retribution. But is an appeal to retribution sufficient to legitimise imprisonment until someone's death? The United Kingdom and the Netherlands seem to find this sufficient. Both countries have implemented a 'life means life' policy in cases in which life imprisonment is imposed. Life imprisonment means de facto detention for the rest of one's life. But these two countries are the exception rather than the rule in Europe. Most other European countries have implemented a review mechanism; in those countries someone's life sentence can be reviewed after a certain period of time. Belgium and Germany have such a system, applied after fifteen years of imprisonment. The ECtHR states that, over time, rehabilitation becomes a more important goal of punishment than retribution.[2] Other countries, like Norway, do not even have life imprisonment. In Norway, imprisonment lasts up to 21 years. After this period, an offender can only be detained if he still poses an unacceptable danger to society. Retribution is not regarded as a legitimate justification for the continuation of imprisonment after 21 years.

But retribution and prevention as punishment goals may also conflict in less extreme examples. Judges might have doubts regarding the type of sanction that an offender might deserve. From a retributive perspective imprisonment might be desired, but in light of preventive goals community service or electronic detention might be a more appropriate sentence. Alternatively, punishment might sometimes be waived altogether if examined from the preventative perspective. Sentences, and in particular imprisonment, can have a negative effect on offenders as it can result in the loss of one's job, house and/or partner, it can lead to stigmatisation and it can even have a criminogenic effect because prison can in fact sometimes be 'a high school for criminals'. Empirical studies demonstrate that community service and electronic detention are more effective than imprisonment in terms of reducing reoffending.[3] Nevertheless, some offences are so serious that – seen from the standpoint of retribution – a judge cannot impose any other type of punishment than imprisonment.

In short, although punishing offenders is, for most people, something logical, just and self-evident, we can definitely question these assumptions.

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[2] See: Vinter v United Kingdom, Appl. No. 66069/09, 130/10 and 3896/10, 9 July 2013.

[3] H. Wermink, A. Blokland, P. Nieuwbeerta and N. Tollenaar, 'Recidive na werkstraffen en na gevangenisstraffen. Een gematchte vergelijking' Tijdschrift voor Criminologie (2009), pp. 211–227; A. Blokland, H. Wermink, L. Robert and E. Maes, 'Wederopsluiting na elektronische detentie en reguliere detentie in België' Tijdschrift voor Criminologie (2015), pp. 31–58.

This chapter is structured as follows. Firstly, we will deal with the concept and nature of punishment. Subsequently, we will explain the influence of the Enlightenment on the 're-invention' of the various theories that attempt to legitimise punishment and criminal law. An explanation of the most common theories of punishment will then be given. Next, we will deal with the manner in which criminal law is currently applied. Finally, a conclusion will restate the most relevant aspects of this chapter.

2. THE CONCEPT OF PUNISHMENT

Based on the definitions of punishment formulated by a variety of criminal law scholars, we can conclude that the content or nature of punishment is the intentional infliction of suffering.[4] The British legal philosopher Hart defines punishment based on the following five cumulative elements: (1) it must involve pain or other consequences normally considered unpleasant; (2) it must be for an offence against legal rules; (3) it must be of an actual or supposed offender for his offence; (4) it must be intentionally administered by human beings other than the offender; and (5) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[5] The American legal scholar Packer concurs with Hart's definition of punishment, but adds an additional cumulative element. This sixth element, however, is not related to the content or the nature of punishment but to the goal for which punishment is imposed, that is to say retribution and/or prevention.[6] The intentional addition of suffering is therefore an essential element of punishment for both Hart and Packer.

Nowadays, several criminal law scholars describe punishment in a broader manner. They define punishment as 'to reprove and to call to order' (Hulsman), 'the disapproval and rejection of the action' (Glastra van Loon), 'to reproach or to blame normatively, so that the person addressed suffers' (Gutwirth and De Hert) or – the widest definition – 'a government response to a violation of a penal provision expressed in the context of a criminal process' (De Hullu).[7] The last definition in particular makes the traditional distinction between punishment and (non-punitive) measures within the criminal sanction system less important.

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[4] C. Kelk, 'Studieboek materieel strafrecht' (Kluwer 2013), p. 9.

[5] H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', in H.L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law (Clarendon Press Oxford 1968), pp. 4–5.

[6] H.L. Packer, 'The Limits of the Criminal Sanction' (Stanford University Press 1968), pp. 21, 27 and 31.

[7] See for these definitions: P. De Hert and S. Gutwirth, 'Het leedprincipe, het strafbegrip en de schuld zonder straf. De fixatie op leedtoevoegende straffen in het strafrecht', in R. Michel and F. Deruyck (eds.), Het strafrecht bedreven. Liber Amicorum Alain De Nauw (Die Keure 2011), pp. 129–156.

According to the classic definition, as presented by Hart and Packer, punishment always contains the intentional addition of suffering, while measures like forced treatment in a clinic do not; they exclusively focus on prevention and reparation – at least officially. Although a measure can be experienced as a punishment by the person who undergoes it, this sanction is not meant to cause suffering. However, seen from a broader definition of punishment, measures can also be labelled as punishment, with the result that all criminal sanctions become forms of punishment.

These broader definitions of punishment have been met with criticism. For example, the Belgian law scholar Lode Walgrave maintains that sanctions have to fulfil all of the following conditions in order to be identified as forms of punishment: (a) coercion (the sanction is imposed top-down by the government to the offender and the view or willingness of the offender does not play a role in the decision); (b) suffering (the imposition of the sanction is accompanied by the offender's suffering; in other words, the sanction hurts); (c) intention (suffering is not a side effect of the sanction but is intentionally inflicted on the offender by means of the sanction); and (d) relation (there is a inextricable connection between the crime committed and the sanction imposed).[8] In the remainder of this chapter, punishment will be defined in the classic way, namely as a reaction by the state to a breach of criminal law containing the intentional infliction of suffering.

Is punishment in the sense of the intentional infliction of suffering a moral evil? This question is not far-fetched because almost every ethical system contains the basic norm 'you shall harm no one'.[9] Now that punishment is the intentional addition of suffering, it does seem as if punishment is a moral evil as well. The British philosopher Bentham wrote in his *An Introduction to the Principles of Morals and Legislation* (1789): 'all punishment in itself is evil'.[10] However, the question is whether such statements mean that punishment is a *moral* evil; after all, an evil is not necessarily a moral evil. Criminal law scholars deem punishment *justified* in some cases – for retribution and/or prevention – and for that reason, they do not view punishment as a moral evil in those cases.[11] Nevertheless, since punishment is the intentional infliction of suffering, most of them argue that the use of criminal law should be last resort (*ultimum remedium*). If other modalities of law enforcement, such as civil or administrative law, may be sufficient, then the use of those modalities is preferred.

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[8] L. Walgrave, 'Herstelrecht en de wet', in B.A.M. van Stokkom (ed.), Straf en herstel. Ethische reflecties over sanctiedoeleinden (Boom Juridische uitgevers 2004), pp. 69–89.

[9] H. Dupuis, 'Over moraal' (Nieuwezijds 1998); J.S. Mill, 'Utilitarianism and On Liberty' (Blackwell Publishing 2003); A. Schopenhauer, 'The Basis of Morality' (Dover Publications 2005).

[10] J. Bentham, 'An Introduction to the Principles of Morals and Legislation' (The Athlone Press 1970).

[11] Not everyone agrees on this, though. So-called restorative justice scholars do see punishment as a moral evil. See on restorative justice below section 5.5.

How can criminal law be distinguished from other modalities of law enforcement, such as civil and administrative law?[12] In contrast to civil law, in which two citizens – i.e. the victim or plaintiff and the offender or defendant – are engaged in a horizontal legal relationship, criminal law is a form of public law, which means law enforcement whereby there is a vertical legal relationship between the government and the citizen (the offender). In other words, while civil law puts the citizen (the victim) in charge, criminal law puts the state in charge.[13] Moreover, criminal law distinguishes itself from civil law by the sanction which is imposed for the violation of the law. While in criminal law, as said, the intentional infliction of suffering is central, civil law focuses on compensation and reparation. However, with the introduction of so-called 'punitive damages' in the Anglo-Saxon world, civil law has also obtained a retributive component.

It is noteworthy to mention that every crime is a tort, but not every tort is a crime. But what is the distinction between a crime and a tort? According to the English jurist Blackstone, a crime is a public wrong while a tort is a private wrong. And while a private wrong only affects the victim, a public wrong also affects the public at large.[14] The Scottish legal philosopher Duff adds to this definition that '[w]e should interpret a public wrong not as a wrong that *injures* the public, but as one that properly *concerns* the public, i.e. the polity as a whole'.[15] However, Blackstone's distinction is too simplistic, since, as said, some torts are also crimes. Some torts seem to be wrongs in that they affect not only the victim but also the public at large, and therefore these torts seem to be in a way public wrongs – with an additional but not solely private aspect.

Administrative law is, like criminal law, a form of public law; both forms of law enforcement concern a legal relationship between government and citizen. However, administrative measures such as 'administrative coercion' and 'administrative performance bond' are primarily orientated towards reparation and prevention. If those sanctions lead to suffering, this suffering is not intended. With the introduction of the so-called administrative fine, administrative law has gained a retributive component as well. This has led to the existence of what is called 'administrative criminal law': punishment by means of administrative fines, in order to relieve the classic criminal law system. The distinction between criminal law and administrative law has been blurred since the introduction of the administrative fine. The ECtHR considers administrative fines to be a form of punishment.[16]

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[12] J. Hage and B. Akkermans, 'Introduction to Law' (Springer International Publishing 2014), pp. 121–123.

[13] R.A. Duff and S. Marshall, 'Criminalization and Sharing Wrongs' Canadian Journal of Law and Jurisprudence (1998), p. 15; R.A. Duff and S. Marshall, 'Public and Private Wrongs', in J. Chalmers et al. (eds.), Essays in Criminal Law in Honour of Sir Gerald Gordon (Edinburgh University Press 2010), pp. 70–85.

[14] G. Fletcher, 'Domination in Wrongdoing' Boston University Law Review (1996), p. 347; W. Blackstone, 'Commentaries on the Laws of England, Book 4' (Clarendon Press), pp. 1765–1769.

[15] R.A. Duff, 'Answering for Crime' (Hart Publishing 2007), p. 141.

3. THE INFLUENCE OF THE ENLIGHTENMENT ON THEORIES OF PUNISHMENT

Due to its inherent violent character, punishment requires a solid legitimisation. Various theories have been developed for this specific purpose. Generally, they are divided into retributive and utilitarian theories of punishment. Mixed or hybrid theories, which strive for a combination of both, also exist. Before addressing the various types of theories of punishment, this paragraph will frame them in the context of the Enlightened criminal law philosophy, as these theories were 'rediscovered' during the Enlightenment.[17]

3.1. PHILOSOPHY OF CRIMINAL LAW DURING THE ENLIGHTENMENT

The Enlightenment can be described as a movement that – by using the reasonable abilities of mankind – has thoroughly changed politics, science, morality, religion and law in the Western world. In part, it is a continuation of the philosophy of classical antiquity and the Renaissance. The Enlightenment originated in the 17th century in England and Scotland, reached its peak in the 18th century in France and experienced its declining years at the start of the 19th century in Germany.[18] The view of the Enlightenment on man and his relationship with the State forms the basis of many theoretical foundations of our current criminal law.

Enlightenment (legal) philosophers, such as the Italian Beccaria and the Frenchman Montesquieu, realised that criminal law should not only be surrounded with more procedural safeguards for the (suspected) citizen than was the case during the *Ancien Régime* (legal protection), but also that it should be more efficient in realising certain goals of criminal politics, including the repression and prevention of crime (so-called instrumentality).[19] Enlightenment criminal law philosophy can be understood as a reaction to the theory and practice during the *Ancien Régime*. This applies to both the criminal law philosophy of continental retributionists like the Germans Kant and Hegel and of Anglo-Saxon utilitarians like Bentham and James and John Stuart Mill.[20] Just as jurists before the Enlightenment realised that the intentional infliction of suffering demands justification, these legal scholars too realised that punishment requires a solid legitimisation, since punishment and the threat of it are a difficult subject from a moral perspective.

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[16] See: Öztürk v Germany, Appl. No. 8544/79, 21 February 1984.

[17] Reinvented, considering that philosophers like Plato and Aristotle during the classical antiquity already thought about the justification of punishments.

[18] A.G. Bosch, 'De ontwikkeling van het strafrecht in Nederland van 1795 tot heden' (AAe Libri 2001), p. 49.

[19] R. Foqué, and A.C. 't Hart, 'Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie' (Gouda Quint/Kluwer 1990); S. Gutwirth, 'Waarheidsaanspraken in recht en wetenschap' (Maklu 1993); C. Beccaria, 'On Crimes and

One might consider the retributive philosophy as belonging more to the continental tradition, and the utilitarian philosophy as being primarily supported in Anglo-Saxon doctrine. However, although it is probably true that the retributive theory has fewer supporters amongst Anglo-Saxon legal scholars (Hart and Packer were preventionists as well),[21] it cannot be argued that it is rejected by them all (the American legal philosopher Rawls (1921–2002), for instance, was a retributionist)[22] or that the utilitarian theory is disparaged in the continental criminal law philosophy (known continental utilitarians are Spinoza, Beccaria, Von Feuerbach, Schopenhauer, Van Hamel, Prins and Von Liszt). In any case, both Enlightenment movements resisted the random, excessive and inefficient exercise of state power through criminal law that was typical of the *Ancien Régime*. Both retributive and utilitarian philosophers were supporters of criminal law as the *ultimum remedium* (subsidiarity), of punishments with moderation (proportionality), of clearly written criminal laws (legality), of a criminal law focusing on the act instead of the intention (thoughts alone cannot lead to punishment), and of retrospective reactions to crimes.[23]

3.2. ENLIGHTENMENT VIEWS ON MANKIND AND THE WORLD

How did the Enlightenment lead to two different theories of punishment, namely retributive and utilitarian theories, despite the fact that their 'inventors' expressly stated that they set out to work rationally? It seems as if Kant, in his criminal law philosophy, applied a different image of mankind and the world than Bentham did. This observation is very important, considering that theories

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Punishments and Other Writings' (Cambridge University Press 1995); Montesquieu, 'The Spirit of the Laws' (Cambridge University Press 1989).

[20] I. Kant, 'Die Metaphysik der Sitten' (Suhrkamp 1979); G.W.F. Hegel, 'Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse' (Ullstein 1972); J. Bentham, 'An Introduction to the Principles of Morals and Legislation' (The Athlone Press 1970); J.S. Mill, 'Utilitarianism and On Liberty' (Blackwell Publishing 2003).

[21] H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', in H.L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law (Clarendon Press Oxford 1968); H.L. Packer, 'The Limits of the Criminal Sanction' (Stanford University Press 1968).

[22] J. Rawls, 'A Theory of Justice' (Harvard University Press 2005).

[23] C. Kelk, 'Studieboek materieel strafrecht' (Kluwer 2013), pp. 21–22.

of punishment are imbedded in certain worldviews and views on man.[24] While Kant assumed the existence of an undetermined, moral reality 'above' the sensory perceptible reality, Bentham only accepted the existence of the empirical reality that is utterly causally determined, including mankind. Bentham thought that man continuously strives for happiness/pleasure, while trying to avoid suffering/pain. On this factual information he then based his utilitarian morality (the greatest happiness for the greatest number of people) and his utilitarian theory of punishment (to ensure the greatest happiness for the greatest number, punishment is sometimes required). According to Kant, man, to the extent he is part of the undetermined, moral reality, has free will. And as a being with free will, he should be held responsible for the crimes of which he is guilty. Kant's vision of man and world offers space for freedom of will, culpability and responsibility and hence consequently retribution; Bentham's does not.

Why has the Enlightenment led to two different theories of punishment? The answer may be rooted in these two distinct views on man and the world. But how did the Enlightenment lead to these two different visions? It can be concluded that an important paradox regarding mankind is inherent in the Enlightenment doctrine: on the one hand, this doctrine elevates mankind to 'the lord of creation'; on the other hand, it reduces mankind to 'a creature that reacts quasi mechanically to external stimuli' and thus does not differ substantially from the rest of nature.[25] In other words, in the Enlightenment philosophy a tension exists between the idea of man as a responsible and free-willed demigod (spirit) and the idea that man is an utterly causally determined, manipulable and controllable machine (body). Considering that various Enlightenment philosophers supported various images of men, there is in fact no one true Enlightenment image of mankind.

3.3. THE ENLIGHTENMENT AS A DIALECTIC PROCESS

The fact that different Enlightenment philosophers had different visions of man, the world and criminal law is not that strange. This belongs to the nature of the Enlightenment as a dialectic movement.[26] This means that in the philosophy of the Enlightenment there is a permanent tension between various ideas.[27] The French philosopher Foucault explained that the Enlightenment has two sides that are inextricably linked, similar to the two faces of the Roman God Janus: one side is characterised by freedom, practical reason and man as subject (spirit); the other side is characterised by discipline, instrumental reason and man as object (body).[28] These two 'components' of the Enlightenment philosophy are in a tense relationship with each other and are intertwined in a dialectic process of thesis and antithesis.[29] In the Enlightenment criminal law doctrine, we can recognise the above-mentioned dialectic in the reinvention of two different criminal law theories that have both influenced the criminal law system. While freedom, practical reason and man as subject are central in the retributive theory, discipline, instrumental reason and man as object manifest themselves in the utilitarian theory.

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[24] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 299–300.

[25] A. Kinneging, 'Geografie van goed en kwaad. Filosofische essays' (Spectrum 2005), pp. 465–466.

[26] L. Abicht, 'De Verlichting vandaag' (Houtekiet 2007), pp. 50–52 and 127.

[27] L. Abicht, 'De Verlichting vandaag' (Houtekiet 2007), p. 119.

4. DIFFERENT THEORIES OF PUNISHMENT

As already stated, since the Enlightenment various theories have been reformulated regarding the justification of punishment. These theories are generally subdivided into retributive, utilitarian or consequentialist, and mixed or hybrid theories. This section will first discuss the retributive theories, then the utilitarian or consequentialist theories, and finally the mixed or hybrid theories. The theories will be discussed by means of the following three questions:

(1) Who should be punished?
(2) Why should someone be punished?
(3) How severely should someone be punished?[30]

4.1. RETRIBUTIVE THEORIES OF PUNISHMENT

4.1.1. Who should be punished?

According to the worldview that is central in the retributive theories, man is in principle a reasonable individual and should be considered to have free will and to be responsible for his conduct. Retributivists emphasise the inextricable coherence between punishment and guilt in the sense of culpability or blameworthiness. Only when a crime has been freely committed can it be repaid with punishment. If this is not the case, it should remain unrequited, because there is no culpability. Punishment without guilt is therefore a contradiction. Within retributive theories, it is nevertheless not truly the offender who is central, but rather his crime. After all, as mankind has free will, only the wrongful and blameworthy act should be redressed through punishment, taking into consideration that the offender can act differently in the future in similar situations. If there is no culpability because there is no free will, there is however room for the application of measures like security and treatment regulations.

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[28] M. Foucault, 'Discipline, toezicht en straf. De geboorte van de gevangenis' (Historische uitgeverij 2007), pp. 203 and 236. Practical reason answers the question of how to act *in a good way*. Instrumental reason answers the question of how to act *to achieve a certain goal*.

[29] R. Foqué and A.C. 't Hart, 'Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie' (Gouda Quint/Kluwer 1990), p. 323.

[30] H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', in H.L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law (Clarendon Press 1968), p. 3.

4.1.2. *Why should one be punished?*

According to retributive theories, someone should be punished because a crime has been committed (*quia peccatum*). The focus is on the past. Retributive theories are also called absolute theories, as punishment should be imposed regardless of the goals/effects that can be pursued in terms of prevention. Still, retributive theories are not as absolute as is often claimed. The punishment is after all deserved in order to 'settle the score'. Although the punishment finds its rationale with the crime that has been committed in the past, it is aimed towards settling the score that originated at that point – a goal that will be realised in the future. Retributive theories are thus not exclusively aimed towards the past.

In this context, it should be noted that there is no such thing as the 'one and only' theory of retribution. The most common answers that retributive philosophers give to the question why justice demands that crimes be punished are: (a) punishment is intrinsically good because it is purifying; (b) punishment restores the *status quo ante*; (c) punishment restores the balance between benefits and burdens; (d) punishment satisfies feelings of vengeance; and (e) punishment expresses moral disapproval.[31]

4.1.3. *How severely should one be punished?*

The punishment that the offender deserves in a specific case is, according to retributivists, dependent on the seriousness of the criminal act that has been committed by the offender and the culpability that can be attributed to him for it. The punishment should be proportional to the seriousness of the offence and the culpability of the offender. Relating the punishment to the magnitude of the injustice and the culpability constitutes the backbone of retribution. Sometimes the emphasis lies on the seriousness of the offence, sometimes on the measure of guilt. However, when the relationship between (the magnitude of) the punishment, (the seriousness of) the crime and (the extent of) the culpability is neglected, the punishment becomes unjust.

The question is also whether repayment *must* take place according to the seriousness of the crime and the extent of guilt. In this context, one should distinguish between positive and negative retributive theories. While positive theories of retribution argue that a crime should be repaid in full to the seriousness of the crime and to the extent of guilt, negative theories of retribution state that a crime can be repaid fully but that this is not necessary. The answer to whether guilt can remain unrequited depends on the intended goals of punishment in terms of prevention. Negative retributive theories thus form a combination of retributive and utilitarian philosophies of punishment; in fact, they are mixed or hybrid theories.

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[31] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 156–166.

4.1.4. Possible criticism of retributive theories of punishment

Criticism of retributive theories is largely connected to the question of why punishment should be inflicted in the first place. Several answers have been formulated. One possible answer is that punishing offenders is intrinsically good. However, according to most people, punishment is a deserved or necessary *evil*. The premise that punishment is intrinsically good seems to be an unverifiable dogma. Furthermore, in contemporary practice, punishment rarely has a purifying effect on offenders and society is seldom willing to reintegrate them after their punishment.

A second possible answer is that through punishment the crime is undone, meaning that the original situation (i.e. the *status quo ante*) has been restored. However, it can be argued that the original situation cannot be restored: what happened in the past cannot be undone as if it never happened. The past always leaves ineradicable traces – at the very least memories. Besides, when the undoing of something is the goal of punishment, the result is not that the original damage is undone, but that new damage is inflicted. One wrong cannot be erased by another wrong: 'an eye for an eye makes the whole world blind'.

A third response is that punishment leads to the recovery of the balance between gains and burdens in society, which was disturbed by the crime. It is thus assumed that offenders, by committing a crime, enjoy an unjustified advantage. This answer cannot escape criticism either. For instance, not every crime necessarily brings (exclusively) advantage to the offender; think of offenders who remain in the attempt or preparation phase. Additionally, most individuals do not experience law-abiding behaviour as a burden. Furthermore, certain crimes are better described in terms of disadvantage for the victim than in terms of advantage for the offender. After all, it is unclear why the balance between gain and burdens should be recovered by means of punishment; why not through damages?

A fourth answer is that punishment satisfies the feelings of revenge created by the crime; punishment results in satisfaction of victims and community. However, just from *the fact* that most people harbour feelings of revenge towards offenders one cannot simply deduce the *moral norm* that these feelings should be satisfied through punishment. At the same time, several (legal) philosophers argue that the need for revenge embodies something of the need for justice. The need for revenge would then be an expression of the moral intuition that offenders should be punished, that they deserve suffering. The question, however, is whether the moral intuition that an offender is supposed to (symbolically) make amends – in other words, that he should restore a balance – is not in fact obscured by feelings of revenge. Revenge, in any case, seems to be contrary to the basic moral intuition that you shall not do harm to others. What is more, do avengers through revenge not degrade themselves to the same level as the offenders?

A final response is that, by punishment, the crime is denounced as morally reprehensible behaviour. Legal scholars who believe in an intrinsic reprobationism deem punishment to be completely legitimised on the grounds of its expressive and communicative function. The question is why the moral rejection of crime must go hand in hand with punishment – in addition to the suffering that the offender experiences through the moral reprimand itself. Punishment is the *ultimum remedium* and the moral rejection of crime should thus take place as much as possible within and by the community and not through criminal law. Furthermore, it remains to be seen whether moral rejection of crime by means of punishment results in moral improvement of offenders.

4.2. UTILITARIAN OR CONSEQUENTIALIST THEORIES OF PUNISHMENT

4.2.1. Who should be punished?

According to the dominant worldview in utilitarian theories, man can be compared to a machine, and can therefore be influenced by biological, psychological and social factors. Utilitarian theories are fully compatible with the theory of causal determinism, i.e. the denial of the traditional libertarian free will.[32] Unlike in retributive theories, culpability does not play any role for utilitarian thinkers. For them, causal determinism is not a hindrance to punishment. In utilitarian philosophy, it is not about whether the offender could have acted differently from what he did in the past, but whether he will act differently in the future if he is punished. Only guilt in the sense of 'having committed the crime' plays any role. In addition, it is not so much the act as the person of the offender that is the focal point within utilitarian theories. The idea behind this is that knowledge of the person of the offender brings with it his manipulability and controllability; the connection between offender and act is much stricter than in the retributive theory. By revealing the biological, psychological and social causes of crime, it can be controlled.

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[32] J. Greene and J. Cohen, 'For the law, neuroscience changes nothing and everything', in S. Zeki and O. Goodenough (eds.), Law and the Brain (Oxford University Press 2006), pp. 207–226.

4.2.2. Why should one be punished?

According to consequentialist theories, also called relative theories of punishment, punishment is required, so that future crimes may be prevented (*ne peccetur*). In utilitarian theories, the connection between crime and punishment is deemed to be dependent on the goal that is to be achieved with the punishment. Although crime and punishment belong together like action and reaction in utilitarian theories as well (here, punishment also finds its excuse in an already committed crime), punishment is only viewed from the perspective of the prevention of future crimes. If the realisation of this goal fails to emerge, punishment should not be used.

In general, the goal to be achieved is described *in abstracto* as prevention of crime. The question in this context appears to be: how does punishment work *in concreto* as far as the stated prevention is concerned? There are different answers to this question. It can concern: (a) incapacitation; (b) deterrence; (c) social re-integration and rehabilitation; (d) strengthening of norms; and/or (e) prevention of taking justice into one's own hands by channelled state vengeance.[33] In deterrence and norm enforcement, a distinction should be made between special and general prevention. While special prevention concerns the actual offender, general prevention concerns potential offenders. Not only is imposing punishment deemed to have a preventive effect on potential offenders, but the threat of punishment is also supposed to have a similar effect.

4.2.3. How severely should one be punished?

Unlike retributive theories, crime in consequentialist theories is not viewed as an immoral act that should be requited based on the seriousness of the act and the extent of culpability, but as a social risk that should be controlled by means of punishment.[34] Freedom of will makes way for a scientifically specified degree of danger that can or cannot be treated.[35] Punishment receives the characteristic of a measure to protect society. This does not mean that punishment as prevention is necessarily less drastic than punishment as retribution. After all, the risk the offender poses to society is now the determinant factor for establishing the severity of the punishment – in combination with the seriousness of the crime.

However, utilitarian theories also include the principles of subsidiarity and proportionality. Punishment is, after all, also an evil because it intentionally inflicts suffering. Punishment is only justified when: (a) it actually prevents future crimes; (b) no instrument of lesser evil exists that has at least the same preventive effect

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[33] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 190–193.

[34] R. Foqué and A.C. 't Hart, 'Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie' (Gouda Quint/Kluwer 1990), pp. 16–17.

[35] S. Gutwirth, 'Waarheidsaanspraken in recht en wetenschap' (Maklu 1993), p. 253.

(subsidiarity); and (c) it does not inflict more damage on the offender and his/her surroundings than would be inflicted on the victim and the community if the crime were to remain unpunished (proportionality). If one of these conditions is not met, punishment should not be imposed. Checking these criteria is an empirical event.

4.2.4. Possible criticism of utilitarian theories of punishment

One of the weaknesses of consequentialist theories is that the realisation of the goal of prevention can hardly be measured in practice. What is more, while the adverse effects of criminal law are already very well known (exclusion, stigmatisation, criminogenic effects – prison as 'a high school for criminals', etc.), the realisation of prevention by means of (the threat of) punishment is disputed to this day.[36] The recidivism numbers are clear. Research has shown that approximately 75% of all former detainees become recidivist within six years after release. For community service, this percentage is approximately 50%.[37]

A more fundamental objection to pure utilitarianism is that it assumes that man is for all forms of crime a *homo economicus* who will invariably choose the behaviour that will give him the most advantages and least disadvantages. While a cost-benefit analysis will probably play some part in economic and environmental crimes, such an analysis plays hardly any role in offences that are committed not as a result of such an evaluation but as a result of emotions, addictions or mental disorders (violent and sexual crimes, for example).

A more major objection to general prevention seems to be that actual offenders could be treated as a mere means to a certain end: the prevention of crime committed by potential offenders. According to retributive philosophers like Kant, this acts contrary to human dignity; people should always be treated (partially) as a goal in themselves. An objection to deterrence is that actual and potential offenders are treated as animals that can be trained by means of (the threat of) punishment, which also leads to dehumanisation.

Finally, although almost all utilitarian philosophers argue that only people who have committed a crime can be punished, it is unclear why consequentialist theories would negate punishing innocent people. If punishment can prevent future criminality and if punishment of innocents is a suitable means to achieve that goal, then there is nothing in utilitarian theories themselves that can indicate why punishing innocent people would not be justified – especially not if citizens are unaware of this practice. Of course, utilitarians are aware of that risk and try to balance this with their own theories of justice. Nevertheless, it often seems that they have to use elements from retributive theories in order to do so.

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[36] M. Tonry, 'Onderzoek naar afschrikking. De noodzaak om klein te denken als we iets nieuws willen leren' Justitiële Verkenningen (2008), pp. 98–102 and 109.

[37] A.J.E. Dirkzwager, W. Lamet, P. Nieuwbeerta, A.A.J. Blokland and P.H. van der Laan, 'Na detentie: de gevolgen van rechtspraak' Rechtstreeks (2009), pp. 11–12.

4.3. HYBRID OR MIXED THEORIES OF PUNISHMENT

Due to the many objections that can be raised to either one of the theories of punishment discussed above, more and more legal scholars suggest that neither pure retributive theories nor pure utilitarian theories can provide a proper justification for punishment. This has led to the origin of mixed theories that try to combine the fundamental principles of both theories. One could claim that the tension between retributive and utilitarian theories is limited in hybrid theories through reconciliation or synthesis.

4.3.1. Two types of mixed theories

There are two types of hybrid theories depending on whether retribution or prevention forms the foundation of punishment. In the first type, retribution constitutes the general justification for punishment. However, the demands of retribution are mitigated through utilitarian considerations in the sense that in order to realise certain goals of punishment there should be less punishment than is demanded on the grounds of retribution. Furthermore, it is possible to decide not to inflict punishment at all on the grounds of the aforementioned utilitarian considerations. Essentially, the first type of hybrid theories concerns so-called negative theories of retribution.[38] In the second type, prevention forms the general justification for punishment but excessive punishments are prevented by using criteria that are central to the framework of retribution, meaning: (a) only someone who has been found guilty of committing a crime can be punished, and (b) punishment cannot be more severe than is proportional to the seriousness of the crime and the culpability of the offender. In principle, both kinds of mixed theories will in practice lead to the same outcome, even though they are theoretically each other's mirror image. The first hybrid theory dominates in the continental doctrine, including the Netherlands; the second type in the Anglo-Saxon world.[39]

4.3.2. Possible criticism of mixed theories

Despite their attractiveness due to their concessions for the shortcomings that are typical of retributive and utilitarian theories, even mixed theories are not entirely unproblematic. Precisely because the ambition is to unite retributive and utilitarian ideas, problems may arise when it seems these are in conflict. Not all hybrid theories necessarily offer a solid justification of punishment. A mixed theory can be 'a shifting patchwork of compromises and arbitrary decisions'.[40] There are even scholars who are of the opinion that the existence of so many different theories of punishment shows just how hard and perhaps impossible it is to provide solid grounds for punishment.

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[38] The negative theories of retribution were discussed in section 4.1.3.

[39] J.W. De Keijser, 'Doelen van straf. Morele theorieën als grondslag voor een legitieme strafrechtspleging', in B.A.M. van Stokkom (ed.), Straf en herstel. Ethische reflecties over sanctiedoeleinden (Boom Juridische uitgevers 2004), p. 55.

For example, the question remains as to whether the retributive view of man can be reconciled with the image of man on which consequentialist theories rest. According to the hybrid theory of the first type, man, in principle, has free will but can be impeded in exercising his freedom by biological, psychological and social factors. Insofar as he has committed his crime in freedom he can be punished; insofar as he has committed his crime under the influence of abovementioned factors he can be treated. The question is how these parts can be precisely balanced in practice.

For some legal scholars, mixed theories are in any case no less controversial than pure retributive and pure utilitarian theories, considering that punishment is and will be intentional addition of suffering, no matter what simple or complex justification is given to it.[41]

5. GOALS OF PUNISHMENT IN CRIMINAL POLITICS: WORLD WAR II ONWARDS

After and under the influence of the horrors that had occurred during World War II a 'universalistic image of mankind' arose that matches Article 1 of the Universal Declaration of Human Rights (1948).[42] This provision reads: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. More than one and a half century after the French Revolution, the motto of the Enlightenment – *liberté, égalité et fraternité* – received universal recognition.

5.1. PENAL WELFARISM: FOCUS ON RESOCIALISATION AND RE-INTEGRATION OF OFFENDERS (1945–1975)

The inherent dignity of every human being – often based, according to Kant, on the fact that man (in contrast to animals) is a reasonable and moral being – was not only associated with the allocation of equal rights (of freedom); it also called for an atmosphere of respect and solidarity. Besides, this moral appeal did not solely emanate from the idea that everyone is part of the reasonable and moral 'family of man'; it was equally nurtured by the insight of the French philosopher Rousseau that man is originally neither king nor prominent nor rich, that all people are born naked and poor, that we are all subject to the needs of life, grief, all kinds of sorrow, and that in the end we are all doomed to die.[43] This insight makes people sensitive to pain and cruelty – and also, through empathy, to the suffering of others.

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[40] J.W. De Keijser, 'Doelen van straf. Morele theorieën als grondslag voor een legitieme strafrechtspleging', in B.A.M. van Stokkom (ed.), Straf en herstel. Ethische reflecties over sanctiedoeleinden (Boom Juridische uitgevers 2004), p. 57.

[41] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), p. 202. See also: section 5.5 on restorative justice.

[42] C. Kelk, 'Verschuivende mensbeelden van gedetineerden', in J. Claessen and D. de Vocht (eds.), Humaan strafwerk. Liber Amicorum Gerard de Jonge (WLP 2012), pp. 185–186.

Regardless of their source, in the post-War period respect and solidarity were shown towards the criminal fellow man who was seen as 'the socially and psychologically weaker man'.[44] Within the framework of prevention, re-socialisation and re-integration were central in this era: like society itself, 'the weaker man' was considered to be manipulable and capable of moral improvement. By re-socialising delinquents, criminality could at the same time be reduced. Under the influence of the French legal scholar Ancel's so-called *défense sociale nouvelle,* almost everywhere in Western Europe the emphasis was on the amelioration and the inclusion of offenders. Underlying causes of criminality, such as social inequality, were also addressed. Retribution was in this period all about the expiation of guilt (read: punishment is intrinsically good because it restores the balance); mankind was deemed to be free of will and – for that reason – morally and legally responsible.

5.2. 'NOTHING WORKS' AND THE RE-INVENTION OF RETRIBUTION AND THE PRISON (1975–1985)

Halfway through the 1970s the concept of re-socialisation started to wane, due to rising crime and recidivism rates. The idea of social engineering of man was severely hampered. Through the decline of the welfare state, in which the thought of penal welfarism is deeply ingrained, slowly but surely – also under influence of the work of the American criminologist Martinson[45] – the notion that *nothing works* emerged, which led to renewed attention for retribution as just deserts (read: punishment satisfies feelings of vengeance). Subsequently, this renewed attention to retribution led to an increase in imprisonment. The prison was, in a certain sense, 'rediscovered'. In contrast to the forgoing decennia, in which resocialisation and re-integration were central even within the prison context, the focus now shifted to the prevention of harm caused by detention itself. It became clear that prison was not able to resocialise people and to prevent their reoffending. On the contrary, prison turned out to have a criminogenic effect on detainees. However, because there was no alternative to prison, imprisonment kept being imposed on perpetrators for the sake of retribution.

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[43] J-J. Rousseau, 'Émile ou De l'éducation' (Garnier 1961), p. 260.

[44] C. Kelk, 'Verschuivende mensbeelden van gedetineerden', in J. Claessen and D. de Vocht (eds.), Humaan strafwerk. Liber Amicorum Gerard de Jonge (WLP 2012), pp. 187–188.

[45] R. Martinson, 'What works? Questions and answers about prison reform' The Public Interest (1974), pp. 22–54.

Besides, it was not Martinson's intention to give rise to the re-invention of retribution and the prison. He presumed and hoped that his work would lead to decriminalisation and depenalisation and to the use of other forms of law enforcement. Unfortunately, his work had the opposite effect, at least in the Anglo-Saxon world and in large parts of Europe – probably mainly because neoliberalism was gaining influence in politics at that point in time. Only Scandinavia was the exception. Here, politicians did opt for decriminalisation and depenalisation because of the malfunctioning of criminal law in terms of reducing reoffending. In a way, Scandinavia has preserved their welfare state – including the notion of penal welfarism. Remarkably, reoffending rates are much lower there than elsewhere.[46]

5.3. CRIME FIGHTING, RISK MANAGEMENT AND 'NEGATIVE' PREVENTION (1985–2001)

Despite of the idea that 'nothing works', citizens' expectations of their government regarding the fight against crime remained demanding and the government kept trying to meet those expectations – especially by using criminal law. In the mid-1980s, politicians who feared that citizens would lose their faith in the government came up with the plan of turning criminal law into a 'company' or 'factory', so that its efficiency could be increased. The era of professionalisation, bureaucracy and management had most definitely begun in criminal law. The process of the instrumentalisation of criminal law, i.e. the process of regarding criminal law as a value-free tool in the hands of politicians in order to fight crime had clearly gained the upper hand.[47] In criminal politics a movement began to dominate characterised by the objective of crime control, which can only be accomplished at the expense of legal safeguards.[48] In this framework, offenders are increasingly stripped of their humanity and their rights by being perceived as irredeemable enemies of society.[49]

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[46] P. Kruize, 'Blik naar het Noorden? Een kenschets van het justitiële beleid in Scandinavië' Justitiële Verkenningen (2013), pp. 88–100.

[47] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 73–89.

[48] D. Garland, 'The Culture of Control. Crime and Social Order in Contemporary Society' (Oxford University Press 2001); H.L. Packer, 'The Limits of the Criminal Sanction' (Stanford University Press 1968).

[49] C. Kelk, 'Verschuivende mensbeelden van gedetineerden', in J. Claessen and D. de Vocht (eds.), Humaan strafwerk. Liber Amicorum Gerard de Jonge (WLP 2012), pp. 196–203.

In the so-called risk society,[50] i.e. the successor of the welfare state, crimes are seen as risks that have to be managed by criminal law: 'criminal law as risk management'.[51] This means that the realisation of those risks has to be prevented as far as possible. Keeping in mind the notion that *nothing works*, 'positive' prevention through treatment and resocialisation programmes made room for 'negative' prevention through deterrence and incapacitation. Though the concept of just deserts was originally also meant as a correction to the absence of legal protection of offenders under the influence of preventionism, it soon became contaminated by the defeatist idea that nothing works. Simultaneously, the 'just deserts' of offenders notably increased under the influence of intensified feelings of revenge and reduced tolerance. Retribution in the sense of expiation of guilt made way for channelled revenge – to prevent someone taking the law in one's own hand – *and* prevention in the sense of re-socialisation was repressed by notions of deterrence and incapacitation. In short, revenge, deterrence and incapacitation became the primary goals of punishment.[52] Under this mixed theory in the risk society, prevention nevertheless prevails; one speaks of 'preventive criminal law'. Retribution has been instrumentalised for the realisation of deterrence and incapacitation.[53] In other words, repression is prevention. In the end, feelings not of anger but of fear dominate in the risk-society. The risk society turned out to be a culture of fear.[54]

5.4. CRIMINAL LAW AS A PRIMARY INSTRUMENT OF SECURITY POLITICS (2001–PRESENT)

Since the quite recent terrorist attacks in the United States, Spain and the United Kingdom, security has become the main and overarching goal of justice, and in the realisation of this goal criminal law is interpreted as the *primum remedium*, pre-eminently as an instrument of security politics.[55] This has resulted, amongst other things, in an inflation of the criminalisation and penalisation of high-risk behaviour, especially at the early stage of preparation (such as conspiracy), in a significant decrease in procedural protection of suspects, and in the considerable increase in the imposition and the duration of sanctions restricting and depriving liberty.[56]

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[50] U. Beck, 'Risk Society. Towards a New Modernity' (Sage 2003).

[51] Th. de Roos, 'Strafrecht als risicomanagement' (Universitaire Pers Leiden 2000); M. Moerings, 'Straffen met het oog op veiligheid; een onderneming vol risico's' (Universitaire Pers Leiden 2003).

[52] J.W. de Keijser, 'Punishment and Purpose. From Moral Theory to Punishment in Action' (Thela Thesis 2000), p. 184.

[53] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), p. 203.

[54] B.A.M. van Stokkom, 'Veiligheid zonder illusies. Angstmanagement en justitieel cynisme' Filosofie & Praktijk (2006), pp. 36–46.

[55] C. Kelk, 'Studieboek materieel strafrecht' (Kluwer 2013), p. 43.

Security, by preventing the realisation of risks, plays a prominent role in modern criminal law. This also follows from the fact that criminal law increasingly works with risk assessments. The estimated chance of recidivism for individual offenders forms an increasingly important starting point for sanctioning. What is also remarkable is that more and more empirical research is conducted on the incapacitation effect of sanctions restricting and depriving offenders of their freedom. The numbers tell us all we need to know. This has the outcome that criminal law is becoming more scientific and is being extended in an instrumentalistic direction, as a result of which the normative, power-critical or protectionist dimension, which is just as essential to criminal law as its instrumental dimension, is lost.

Traditional Enlightenment principles like harm, subsidiarity, proportionality, guilt and legality are being increasingly undermined.[57] The same applies to the resocialisation principle that has developed from being a universally applicable assignment to the government, through a choice to be assigned to the detainees that they will have to make themselves, to an assigned privilege to a select category of detainees.[58] The theme of the somewhat more hopeful sounding *what works*-approach – with its focus on special prevention, enhancement of efficiency of criminal sanctions and selective use of expensive behavioural interventions and with its enthusiasm for best practices and evidence-based interventions – is ultimately the prevention of the realisation of (new) risks, whereby resocialisation is only a privilege for a select group, i.e. a group labelled by science as showing promise and motivation.

The idea of the invariability and impenitence of offenders seems still to be the starting point, which plays into the hand of deterrence and incapacitation. The question is whether such a view of man and the accompanying policy are legitimate seen from a normative and scientific perspective. For example, empirical research demonstrates that recidivism rates after community service or electronic detention are lower than after imprisonment and that programmes based on the concept of resocialisation are more efficient in terms of reducing reoffending than sanctions that focus on deterrence.[59] Thus, severe punishment and harsh treatment are not necessarily synonymous with smart sanctioning. Indeed, the opposite is true, as humane sanctioning can be more efficient in reducing reoffending than draconic punishment and treatment. Unfortunately, many European countries, including the Netherlands, are still mainly inspired by the United States and the United Kingdom and their neoliberal tough-on-crime politics and not, for example, by Scandinavia and its penal welfarism.[60]

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[56] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 56–73.

[57] R. Foqué and A.C. 't Hart, 'Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie' (Gouda Quint/Kluwer 1990); S. Gutwirth, 'Waarheidsaanspraken in recht en wetenschap' (Maklu 1993); J. Keiler and D. Roef, 'Introduction', in J. Keiler and D. Roef (eds.) Comparative Concepts of Criminal Law (Intersentia 2016), p. 6.

[58] J. Claessen, 'Strafrecht en vertrouwen in de medemens – vijftig jaar later. Het gevangeniswezen tegen de achtergrond van de ideeën van Willem Pompe' Strafblad (2014), pp. 229–242.

[59] H. Wermink, A. Blokland, P. Nieuwbeerta and N. Tollenaar, 'Recidive na werkstraffen en na gevangenisstraffen. Een gematchte vergelijking' Tijdschrift voor Criminologie (2009), pp. 211–227;

5.5. THE RETURN OF THE VICTIM IN CRIMINAL LAW AND THE REVIVAL OF RESTORATIVE JUSTICE

At the end of this section attention will be paid to two related current developments in criminal law: the return of the victim and the revival of restorative justice. To understand these developments we have to go back in time, since it was with the arrival of Napoleon Bonaparte that all forms of 'private' criminal law, i.e. what we now would call victim-offender mediation, group conferences and sentencing circles, were abolished in the Western world. The consequence of this was that the victims of crime were no longer stakeholders in criminal law. They were sent to the civil court to get compensation for the crime as a tort, while in public criminal law a public prosecutor and an independent and impartial judge appointed by the State had to prosecute and judge in the name of the community of which both victims and offenders were part. Since about 1800, victims of crime have only been able to participate in criminal proceedings as declarant or witness, although several European countries, e.g. Belgium and Germany, have incorporated a possibility of prosecution initiated or supported by the victim.

Since the mid-1980s, victims have slowly but surely regained a position in criminal law, independently of their position in civil law. Since the Framework Decision on the status of the victim in criminal proceedings (2001/220/JBZ), the EU has obliged the Member States to incorporate several victims' rights into criminal law, e.g. the right to information, the right to access to the criminal file, the right to make a victim impact statement, the right to a lawyer, the right to an interpreter and the right to receive compensation. Nonetheless, it appears that the improvement of the position of victims of crime in criminal proceedings is not only a consequence of the victim movement that stands for the emancipation of

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A. Blokland, H. Wermink, L. Robert and E. Maes, 'Wederopsluiting na elektronische detentie en reguliere detentie in België' Tijdschrift voor Criminologie (2015), pp. 31–58; B. Wartna, D. Alberda and S. Verweij, 'Een meta-analyse van Nederlands recidiveonderzoek naar de effecten van strafrechtelijke interventies' Tijdschrift voor Criminologie (2013), pp. 3–23.

[60] R. van Swaaningen, 'Waarom kijken wij eigenlijk naar Amerika?' Justitiële Verkenningen (2013), pp. 37-51; M. Boone and R. van Swaaningen, 'Dalende detentiecijfers in Nederland', in J. Claessen and D. de Vocht (eds.), Humaan strafwerk. Liber Amicorum Gerard de Jonge (WLP 2012), pp. 51–71.

victims but also of the above-mentioned hardening of criminal law. In support of this thesis one can point to populist politicians who nowadays plead for a criminal law practice based on and directed at revenge, deterrence and incapacitation in the name of 'the victim'. The increased attention to the position of victims has led to measures that primarily meet – if we are to believe populist politicians – their call for retribution, deterrence and incapacitation, which is almost automatically at the expense of programmes based on re-socialisation and rehabilitation. Although empirical research shows that not all victims are (extremely) vengeful, that many victims do hope that their offenders amend their lives and stop committing offences in the future, and that some victims even show empathy with offenders, populist politicians want us to believe that victims long for 'an eye for an eye'.[61]

On the other hand, the aforementioned attention to the position of victims of crime has also led to a revival of restorative justice, i.e. victim–offender mediation, group conferences and sentencing circles, in criminal law.[62] This does not mean that all proponents of victims' rights plead for the incorporation of restorative justice practices. On the contrary, as said, some politicians (mis)use 'the victim' not to civilise criminal justice but to realise an even more punitive criminal law practice; restorative justice would be too soft for the 'vengeful victim'. Furthermore, not all victimologists are entirely positive about restorative justice. For example, it would 'force' victims to suppress their resentment and other negative sentiments and to forgive their offenders – in accordance with the Christian morality that considers wrath to be one of the seven cardinal sins.[63] However, as mentioned, since the Framework Decision on the status of the victim in criminal proceedings (2001/220/JBZ), the European Union has obliged the Member States to incorporate restorative practices into and around criminal procedure as a right of the victim.[64] Unfortunately, this victim-centred approach makes it easy to forget that restorative justice is meant not only for victims but also for perpetrators and the community and that all parties to a conflict have rights as well as obligations and responsibilities, including victims.[65]

But what is restorative justice exactly? Notwithstanding the fact that there are several currents within the restorative justice movement – from very minimalistic

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[61] A. Pemberton, 'Too Readily Dismissed? A Victimological Perspective on Penal Populism', in H. Nelen and J. Claessen (eds.), Beyond the Death Penalty. Reflections on Punishment (Intersentia 2012), pp. 105–119.

[62] D.J. Cornwell, J. Blad and M. Wright (eds.), 'Civilising Criminal Justice. An International Restorative Agenda for Penal Reform' (Waterside Press 2013).

[63] J.J.M. van Dijk, 'The Mark of Abel. Reflections on the Social Labelling of Victims of Crime', inaugural lecture, University of Tilburg (2 November 2006); J.J.M. van Dijk, 'Free the Victim. A Critique of the Western Conception of Victimhood' International Review of Victimology (2009) (16), pp. 1–33.

[64] In 2012 this framework decision was replaced by the EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

[65] B.A.M. van Stokkom, 'A "Natural" Right to Revenge? Victim Impact Statements and Penal Populism', in H. Nelen and J. Claessen (eds.), Beyond the Death Penalty. Reflections on Punishment (Intersentia 2012), pp. 121–138.

(restorative justice only as a supplement to criminal law if parties voluntarily agree) to very maximalistic (restorative justice as a replacement of criminal law even if parties do not voluntarily agree) – it can be argued that restorative justice implies a different way of doing justice after a crime is committed. As stated in section 2, most criminal law scholars see an inseparable connection between criminal law and punishment, while they define punishment as the intentional infliction of suffering on an offender. So-called restorative justice scholars see punishment not only as an evil but also as a moral evil, because they deem to be punishment contradictory to the Golden Rule that states that you should treat others the way you would want to be treated, which basically means that you cannot harm anyone – not even if they harm you.[66] Said philosophers are in favour of replacing negative actions towards offenders (punishment) by positive reactions from offenders towards victims and community (restorative sanctions) – possibly complemented by measures focusing on treatment and providing security. In fact, retributivists and restorative justice scholars have something essential in common: both argue that crime causes a disbalance that has to be restored. However, they differ on 'the currency' which can restore the balance. For retributivists the means to this end is punishment; for restorative justice scholars this is restoration in the aforementioned way.

Some legal scholars do state, however, that even sanctions that are solely aimed at restoration, security or treatment can also be labelled as punishment if they are imposed against the will of the offender.[67] Others, including Walgrave,[68] state that those sanctions cannot be labelled as punishment because they do not intend to harm the offender. Seen from my own perspective, sanctions can have a double violent character (a) when they consist of the intentional infliction of suffering (for retribution and/or prevention) and (b) when they are imposed against or irrespective of the will of the offender. If both conditions are met, this clearly is a case of punishment. Restorative sanctions, as well as security and treatment measures, can also have a singular violent character, namely when they are enforced. For that reason, these sanctions can be qualified as punishments as well. It would be quite difficult to argue, however, that sanctions that do not contain intentional addition of suffering *and* that – by means of counselling, encouragement or persuasion – are 'voluntarily' accepted by the offender have the character of punishment. Within restorative justice the focus lies on the voluntary acceptance of sanctions, by encouraging offenders to take responsibility for what they have done and by encouraging them to repair (in a symbolical way) what they have broken – making use of victim-offender mediation, group conferences and sentencing circles.

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[66] J. Claessen, 'Misdaad, straf en herstel. Een herbezinning op het strafrecht en een aanzet tot een op herstel georiënteerd misdaadrecht' (WLP 2011), pp. 101–105.

[67] R.A. Duff, 'Restorative punishment and punitive restoration', in L. Walgrave (ed.), Restorative Justice and the Law (Willan Publishing 2002), pp. 82–100; J. Blad, 'Het sanctieconcept van het herstelrecht' Sancties (2011), pp. 232–250; J. Claessen, 'Pleidooi voor een ruimer strafbegrip of een strafrecht zonder straffixatie' Tijdschrift voor Herstelrecht (2012), pp. 37–49.

[68] See: section 2.

6. CONCLUDING REMARKS

In this chapter, the concept of punishment is described as the intentional infliction of suffering. Although punishment seems to be an evil, according to retributionists and utilitarians it is a morally justifiable evil if a crime has been committed. According to restorative justice scholars, however, punishment is not only an evil but a moral evil as well. It was explained that the Enlightenment that underlies our current criminal law has – due to its paradoxical image of mankind and the world and its dialectic character –been the breeding ground for the reinvention of both retributive and utilitarian theories of punishment. These theories were subsequently discussed. The conclusion was that both theories of punishment can be criticised. Mixed theories, which bring about a synthesis between retributive and utilitarian theories, are not exempt from criticism either, as a number of the possible criticisms of retributive and utilitarian theories also apply to hybrid theories. Furthermore, retributive and utilitarian theories, principles and accompanying images of mankind and the world can be conflicting. All in all, it seems as if punishment cannot be supplied with a definitive foundation. Finally, mention was made or the current practice of criminal law, which mainly aims at revenge, deterrence and incapacitation, while in the risk society preventionism prevails.

The current practice of criminal law reveals that the tension between various ideas that, according to the Enlightenment philosophy, should ideally be present in criminal law seems to have disappeared and that the scale has currently tipped in favour of instrumentality, efficiency, pragmatism, quantity, control, prevention, causal determinism and man as object, and at the same time away from legal protection, justice, moralism, quality, emancipation, retribution, free will and man as subject. Even though the current criminal law system has its origin in the Enlightenment, criminal law is not currently practiced in accordance with Enlightenment ideas, now that the tension and search for balance between sword (instrumentality) and shield (legal protection) have disappeared.

We began our journey with the statement that, although for most people punishing offenders is logical, just and self-evident, it is nevertheless not as obvious in certain cases. On the basis of what is said in this chapter we can also conclude our journey with the same statement. Criminal law and punishment need to be constantly scrutinised – especially in times in which politicians think that every problem in society must be resolved with it.

CHAPTER II

PRINCIPLES OF CRIMINALISATION AND THE LIMITS OF CRIMINAL LAW

Johannes KEILER and David ROEF

1. INTRODUCTION

As outlined in the previous chapter, the notion of punishment, defined as the intentional infliction of suffering, imposed for a violation of the norms of criminal law requires justification. Yet it is not only the concept of punishment that, due to its inherently violent character, is in need of legitimation within liberal criminal justice systems. As criminal law is a body of law that subjects offenders to the harshest of all state interferences with the liberty of citizens, the politics of criminalisation itself requires a solid justification.[1] Punishment (especially imprisonment) severely limits people's freedom and furthermore also expresses public censure and imposes a stigma on offenders for wrongdoing.[2] The consequences of violating the norms of criminal law are so serious and far-reaching for individuals (and organisations) that the decision to criminalise certain behaviour should never be taken lightly and requires justification by the legislator and those who wish to transform certain (currently) non-criminal behaviour into a criminal offence. This need for justification is particularly strong if we accept, as it is sometimes argued, that in a liberal state citizens possess a general right not to be punished.[3]

A complicating factor for this justificatory requirement and efforts to limit the reach of criminal law is however that in any given criminal justice system there exist a vast range of very diverse criminal offences. These range from petty crimes such as fare dodging and disturbance of the peace while in a state of drunkenness[4] to homicide offences, child molestation, fraud, illicit drug possession, environmental pollution and so forth. The sheer breadth and diversity of criminal offences that can be found in criminal codes and statutes already, at the outset, raises the question whether it is even possible to detect and establish general limits for criminal law, or, as some have lamented, whether criminal law has become a 'lost cause'.[5]

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[1] Generally see: A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 22 et seq. See also: D. Husak, 'Overcriminalisation' (Oxford University Press 2008), pp. 92 et seq.

[2] D. Husak, 'Overcriminalisation' (Oxford University Press 2008), pp. 92 et seq.

[3] D. Husak, 'Overcriminalisation' (Oxford University Press 2008), pp. 92 et seq.

[4] E.g. Art 426 and Art. 453 DCC.

To answer the question as to which conduct may be rightly criminalised by the state, varying approaches have been developed and discussed in legal doctrine. Common law countries such as England and Wales often adopt a principled approach in this context. In particular, the principle of individual autonomy and the so-called harm principle are of great importance. But also in the Netherlands principles of criminalisation play a role in penal legislation debates. On the other hand, German criminal law has developed its own theories of criminalisation, in particular the so-called theory of legal goods (*Rechtsgütertheorie*). Yet, as will become clear, within the German theory of criminalisation too similar interests and values as expressed by different principles of criminalisation play a role and shape the criminalisation debate.

It may be helpful to keep in mind that the different theories and principles of criminalisation generally possess a legitimising and a facilitating function.[6] In their *legitimising* function, the criteria for criminalisation are closely connected to the underlying goals of criminal law in society, which may of course change in the course of time. In this sense, criteria of criminalisation are linked to fundamental principles of law and aim at the realisation of legitimate goals of criminal law in society (such as retribution, harm prevention, etc.).[7] Hence, principles of criminalisation seek to legitimate the use of criminal law by providing a rational basis for the decision as to which conduct ought to be punished. In their *facilitating* function, the principles of criminalisation ideally help to sharpen the legislator's view with regard to the identification of interests that warrant the protection of criminal law. These principles are meant to contribute to and foster a rational and consistent legislative process, by providing a framework for balancing competing interests. Their facilitating function can thus be found in the fact that they help to make transparent, as well as order and balance, relevant arguments in favour of or against the criminalisation of certain forms of behaviour.[8]

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[5] See for instance: A. Ashworth, 'Is the criminal law a lost cause?' Law Quarterly Review (2000), pp. 225–256.

[6] C.P.M. Cleiren, 'Functie en waarde van criteria voor strafbaarstelling in het huidige tijdsgewricht' in C.P.M. Cleiren et al. (eds.), Criteria voor strafbaarstelling in een nieuwe dynamiek (Boom Lemma uitgevers 2012), pp. 7–24.

[7] C.P.M. Cleiren, 'Functie en waarde van criteria voor strafbaarstelling in het huidige tijdsgewricht' in C.P.M. Cleiren et al. (eds.), Criteria voor strafbaarstelling in een nieuwe dynamiek (Boom Lemma uitgevers 2012), pp. 7–24.

[8] C.P.M. Cleiren, 'Functie en waarde van criteria voor strafbaarstelling in het huidige tijdsgewricht' in C.P.M. Cleiren et al. (eds.), Criteria voor strafbaarstelling in een nieuwe dynamiek (Boom Lemma uitgevers 2012), pp. 13–15.

It is also important to recognise that in any criminalisation debate many arguments in favour or against criminalisation of a given conduct, may be politically contingent. In other words, issues of criminal policy may strongly influence the decision of the legislator to either declare certain behaviour unlawful or not. Criminal policy is however not carved into stone but rather very much subject to constant change. In this chapter we will therefore first give some attention to how some relatively recent societal changes have led to shifting criminal policies, which influenced not only the setting of the criminalisation agenda, but also the way in which traditional principles and theories of criminalisation are being implemented. Subsequently we will discuss three main guiding principles, i.e. individual autonomy, welfare and the harm principle, which paves the way in addressing two separate problems: the issue of criminalising morality (legal moralism) and the criminalisation of remote harms. This is followed by an exploration of the German theory of legal goods (*Rechtsgütertheorie*) and how human rights have helped to shape criminalisation. Finally, we will give some thought on the principle of ultima ratio or last resort.

2. CRIMINALISATION AND SHIFTING CRIMINAL POLICIES

As stated, societal transformations and the corresponding changing nature of society's perception of, and relationship to, crime influence criminal policies that states adopt and follow. It therefore seems pertinent first to take a closer look at two major developments that have considerably informed modern criminal policies, as well as criminal law itself: the emergence of the risk society and the shift from penal welfarism to a culture of control.

2.1. FROM WELFARE STATE TO RISK SOCIETY

Modern societies are increasingly preoccupied with safety[9] and security.[10] We want to be safe and secure from organised crime, terrorism, asylum seekers, the effects of genetically modified food, environmental pollution, etc. Risks, in all forms and sizes, and subsequently risk management and prevention, have become central to our way of thinking. While human societies have arguably always been exposed to danger and risks like natural disasters, famine or deadly illnesses such as the plague, the causes of these traditional risks have usually been attributed to outside, non-human forces like nature or even divine providence (an act of god). Modern industrialised and globalised societies are however increasingly confronted with 'new' risks that are intrinsic to the institutional set-up and organisation of our modern society, such as cybercrime, global warming, pollution, radiation, and new illnesses such as the Zika virus or the mad cow disease. What they all have in common is that they have to be understood as uniquely man-made or *manufactured* risks, as they are the result of the rapid modernisation and innovation process.[11] Science and technology not only make our lives safer, but at the same time, they produce just as many risks and uncertainties.[12] Every new invention or technological development may potentially cause deadly effects in the distant future, of which we are currently still blissfully unaware. Just think for instance of the noxious effects of tobacco, asbestos, amalgam fillings or thalidomide, of which we were unaware in the past, but which have now been widely recognised.

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[9] Safety is a normative, broad and boundless concept, but can be defined as 'the state of being protected from or guarded against hurt or injury; freedom from danger'. See: Oxford English Dictionary, 'safety, n.' OED Online, Oxford University Press, July 2018, www.oed.com/view/Entry/169687 (accessed 09.10.2018).

[10] Security also qualifies as a boundless concept, but can generally be defined as 'freedom from care, anxiety or apprehension; absence of worry or anxiety; confidence in one's safety or well-being'. See: Oxford English Dictionary, 'security, n.' OED Online, Oxford University Press, July 2018, www.oed.com/view/Entry/174661 (accessed 09.10.2018). This definition already makes clear that security is not only an objective concept but also contains strong subjective elements. In the context of criminal policy, security 'can be defined as the presence

One catchphrase that has been used to encapsulate these ongoing social changes is 'the risk society', a term first used by the German sociologist Ulrich Beck. He describes the risk society as 'a phase of development of modern society in which the social, political, ecological and individual risks created by the momentum of innovation increasingly allude the control and protective institutions of industrial society.'[13] This has led to a change in how we generally perceive the ongoing modernisation of our daily lives, how we deal with uncertainties and how we evaluate the future. While in the traditional welfare state, the distribution of 'goods' was seen as the central task of the state, in the modern risk society it is rather the distribution of 'bads' that has taken centre stage.[14] In the welfare state, the main question was how the wealth created by society, such as consumer goods, incomes, healthcare and career opportunities, etc.,

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of a certain order and peace in the public domain and as the protection of life, health and property against acute or potential infractions'. See: R. Peeters, 'The Preventive Gaze' (Eleven Publishing 2013), p. 147; L. Zedner, 'The concept of security: an agenda for comparative analysis' Legal Studies (2003), pp. 154–176.

[11] A. Giddens, 'Risk and Responsibility' The Modern Law Review (1999), p. 4.

[12] C. Wells, 'Corporations and Criminal Responsibility' (Oxford University Press 2001), p. 42.

[13] U. Beck, 'World Risk Society' (Polity Press 1999), p. 112.

[14] Note that the terms 'goods' and 'bads' carry a double meaning here and are used both in a literal and more moral sense. 'Goods' refers to commodities as well as the beneficial (social) results of the welfare state, while 'bads' refers to the negative effects of modernisation that are at the same time also perceived as moral wrongs. See also: G. Mythen and S. Walklate, 'Communicating the terrorist risk: Harnessing a culture of fear?' Crime Media Culture (2006), p. 124.

can be fairly and equally distributed amongst all members of society. In the risk society, the focus has however shifted to the question of how the risks and hazards systematically produced as part of modernisation, such as pollution, cybercrime and terrorism, can be prevented, minimised and channelled.[15] Take for example the problem of food and product safety, where laws tightly regulate the amounts of potentially harmful substances that are permissible in our foodstuffs.[16] On the flipside, in order to be able to effectively tackle risks, the state also demands more from its citizens in terms of responsibility (for potential sources of danger), social control, self-discipline and cooperation.

The increased political concern about risks and risk management has had a significant impact on contemporary conceptions of crime, criminal liability and even the function of criminal law itself. As risks are by definition situated in the future, criminal law is nowadays more and more concerned with the prevention of future harms than with the traditional retrospective punishment of manifested harm. The containment of (potential) risks, the prevention of harm and the provision of security have become the ultimate goals of criminal norms.[17] Preventing harm by pre-empting threats and addressing the conditions that are conducive to or may lead to crime have become paramount in modern criminal policies.[18] Faced with seemingly increasing (external and internal) risks and dangers, citizens increasingly demand from their government security, which has partially transformed the state into a risk-management institution. After the 9/11 attacks on America, Beck has even labelled our society as a 'terroristic world risk society', characterised by political disorientation and permanent uncertainty: 'there is a sinister perspective for the world after September 11th. It is that uncontrollable risk is now irredeemable and deeply engineered into all the processes that sustain life in advanced societies.'[19]

2.2. FROM PENAL WELFARISM TO A CULTURE OF CONTROL

The rise of the risk society as the successor of the welfare state is not the only societal change that has had a considerable impact on criminal law and policy.

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[15] U. Beck, 'Risk Society – Towards a New Modernity' (Sage Publications 1992), p. 19.

[16] See also: U. Beck, 'Risk Society – Towards a New Modernity' (Sage Publications 1992), pp. 64 et seq.

[17] See: A. Ashworth and L. Zedner, 'Preventive Justice' (Oxford University Press 2014); R. Peeters, 'The Preventive Gaze' (Eleven Publishing 2013); L. Zedner, 'Pre-crime and post-criminology?' Theoretical Criminology (2007), pp. 261–281; D. Cole, 'The difference prevention makes: regulating preventive justice' Criminal Law and Philosophy (2015), pp. 501–519.

[18] J. McCulloch and S. Pickering, 'Pre-crime and counter-terrorism' British Journal of Criminology (2009), pp. 628–645.

[19] Quoted in G. Mythen and S. Walklate, 'Communicating the terrorist risk: Harnessing a culture of fear?' Crime Media Culture (2006), p. 126.

In recent decades we have also witnessed a major paradigm shift within the culture of the criminal justice system itself, in the way its institutions and practices, which are to a large extent the creations of the welfare state, have been re-invented and given a new political significance. We are referring here to what the criminologist David Garland has called the emergence of the new culture of crime control. In his widely acclaimed work, *The Culture of Control: Crime and Social Order in Contemporary Society*, Garland describes how the mid-century period of penal welfarism, in which the criminal justice system was strongly motivated by the progressive ideals of the welfare state, such as integration and rehabilitation, was gradually replaced by a more regressive, punitive culture of control, in which the incapacitation of the delinquent and the protection of the public became more central.[20] Although Garland's analyses are mostly focused on criminal policy changes in the UK and the US, and taking into account that a culture of control may manifest itself very differently in continental Europe,[21] there are still common transformations and concerns.[22] How can we characterise some of the elements that indicate the shift from penal welfarism to a culture of control?

Until the mid-1980s, the criminal policy of the welfare state was very much motivated by the belief in the inevitability of socio-economic progress, the perfectibility of man, and in the capacity of the state to remedy both the social and individual causes of criminality.[23] This resulted, for instance, in the introduction of new penal instruments, like probation and parole, in specific strategies for vulnerable groups, such as juvenile delinquents, and in the use of the prison as a place of rehabilitation (instead of only punishment).[24] With the emergence of the culture of control, however, the emphasis is no longer on the causes but on the consequences of crime, and how to contain and control them.[25] Simply put, the state adapted to its self-diagnosed failure to *solve* the problem of crime and consequently developed a policy of *controlling* crime.[26] This paradigm shift, to a large extent reinforced by the rise of the risk society, resulted in different penal transformations, including a re-emergence of punitive sanctioning, an increased concern for security and crime prevention, the decline of the rehabilitative ideal, the fore-grounding of the (real or imagined) victim, and changes in the emotional tone of crime policy.[27]

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[20] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001). See for some insightful commentaries on this work: K. Beckett, 'Crime and Control in the Culture of Late Modernity' Law & Society Review (2001), pp. 899–930; R. Hogg, 'Crime Control in Late Modernity – David *Garland's The Culture of Control: Crime and Social Order in Contemporary Society*, 2001, Oxford University Press' Current Issues in Criminal Justice (2002), pp. 224–240; L. Zedner, 'Dangers of Dystopias in Penal Theory' Oxford Journal of Legal Studies (2002), p. 341; M. Feeley, 'Crime, Social Order and the Rise of Neo-Conservative Politics' Theoretical Criminology (2003), p. 217.

[21] See for example on how the culture of control has influenced sentencing policies in the Netherlands: D. Downes and R. van Swaaningen, 'The Road to Dystopia? Changes in the Penal Climate of the Netherlands' Crime and Criminal Justice (2007), pp. 31–71.

[22] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 7.

[23] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 188; R. Hogg, 'Crime Control in Late Modernity – David Garland's *The Culture of Control: Crime and Social Order in Contemporary Society*, 2001, Oxford University Press' Current Issues in Criminal Justice (2002), p. 224.

[24] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 34.

As the title of Garland's book indicates, these developments did not change so much the *structure* or formal machinery of the criminal justice system, but rather the *culture* that enlivens this structure.[28] The transformation is not a change at the level of traditional institutions and practices, but has taken place at the level of culture within the existing system. For instance, penal modalities like parole and probation were never abandoned, nor did we abolish juvenile courts, but their use and social significance have been transformed in the sense that they have become more security-minded instruments for crime control. Moreover, some rehabilitative interventions have changed from a client-centred approach, where the offender's personality and social relations formed the main object of transformative practices, into an offence-centred approach, where the main objective is to protect the public and prevent future victims.[29] Accordingly, an addict who commits drug-related crimes, for example, is nowadays no longer primarily seen as a victim of poor social circumstances in need of support (as was the case in the welfare state), but rather as a risk to public security that needs to be controlled, managed and, should this prove necessary, ultimately removed from society.

Arguably, a culture of control reconceptualises safety, and crime as its perpetual threat, in purely negative terms, no longer connected to positive ideals like social justice, equal opportunities or remedying social exclusion. Safety concerns are now interpreted as getting rid of people and neutralising criminogenic circumstances that threaten the general public's feeling of safety.[30]

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[25] Garland identifies several socio-economic conditions and political developments that facilitated the shift from penal welfarism to a culture of control, such as the increase of crime rates, disillusion in some welfare state institutions, dramatic changes in the labour market, the rise of populist conservative politics and neo-liberalism, and the emergence of mass media. For the purposes of this chapter, we would enter a too-vast territory if we were to even try to give just a short summary of all these developments.

[26] G. Mythen and S. Walklate, 'Communicating the terrorist risk: Harnessing a culture of fear?' Crime Media Culture (2006), p. 133.

[27] K. Beckett, 'Crime and Control in the Culture of Late Modernity' Law & Society Review (2001), p. 911.

[28] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 175.

[29] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 176.

[30] D. Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (Oxford University Press 2001), p. 171.

As an example, we may think here of the often hostile societal and political responses to paedophiles, which has, amongst others, also resulted in the criminalisation of online grooming[31] and virtual child pornography.[32] The culture of control clearly fosters, but also flourishes in, a societal climate where delinquents, but also other groups, like illegal immigrants and asylum seekers, are increasingly characterised as the dangerous 'others' who threaten our social order.[33] Garland characterises this so-called 'criminology of the other' as follows: 'In this rhetoric, and its policy effects, offenders are treated as a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help. The only practical and rational response to such types is to have them "taken out of circulation" for the protection of the public'.[34] This arguably influences the penal legislation agenda, as can be seen in recent debates on the criminalisation of migration.[35]

2.3. SOME CONSEQUENCES FOR CRIMINALISATION

The aforementioned societal changes and the corresponding shift in the focus of criminal law have triggered a steady increase in criminal offences as well as sanctioning mechanisms. This phenomenon is sometimes also dubbed 'overcriminalisation'.[36] Many factors have contributed to this phenomenon. However, with regard to the proliferation of (preventive) criminal offences and the (cultural) reform of national criminal justice systems, the phenomenon of terrorism, which after 9/11 emerged as the number one issue in international as well as national criminal policies, arguably also played a role.[37]

As a response to the threat of modern terrorism, a plethora of new offences were developed which pushed the envelope of traditional criminal law by criminalising a wide variety of acts, of which some are only remotely connected to the violence of terrorist attacks. The criminalisation of preparatory conduct (for example, collecting information or possession of articles useful to commit or prepare terrorist offences)[38] was just the first step here. Beyond that, the legislators created offences that target for instance recruitment and training for terrorist purposes, financing[39] and the glorification of terrorism.[40] It seems clear that these activities are, at best, remotely connected to the harm generally associated with terrorism offences, which may cause frictions with traditional principles of criminal law.[41]

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[31] J. ten Voorde, 'Schade in de virtuele wereld: de casus virtuele grooming' Netherlands Journal of Legal Philosophy (2017), pp. 177–195.

[32] Virtual child pornography refers to (computer-generated) images where no real child is involved, which raises some questions about its actual criminality and the permissibility of its criminalisation. See: S. Ost, 'Criminalising fabricated images of child pornography: a matter of harm or morality' Legal Studies (2010), pp. 230–256.

[33] M. Welsh and L. Schuster, 'Detention of asylum seekers in the US, UK, France, Germany and Italy: A critical view of the globalizing culture of control' Criminal Justice (2005), p. 334.

[34] D. Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' The British Journal of Criminology (1996), p. 461.

[35] See: J. Banks, 'The Criminalisation of Asylum Seekers and Asylum Policy' Prison Service Journal (2008), pp. 43–49; A. Spena, '*Iniuria Migrandi*: Criminalisation of Immigrants and the Basic Principles of the Criminal Law' Criminal Law and Philosophy (2014), pp. 635–657.

[36] Generally see: A. Ashworth and L. Zedner, 'Preventive Justice' (Oxford University Press 2014); D. Husak, 'Overcriminalisation' (Oxford University Press 2008); and E. Luna, 'The overcriminalisation phenomenon' American University Law Review (2005), pp. 703–743.

[37] Generally see: K. Nuotio, 'Terrorism as a catalyst for the emergence, harmonization and reform of criminal law' Journal of International Criminal Justice (2006), pp. 998–1016.

In any case, having first been used in the field of terrorism, many preventive mechanisms and offences have subsequently also found their way into other areas of criminal law. Nowadays, an increased focus on prevention is also clearly visible in fields such as organised crime, environmental crime, traffic and drug offences or the sexual abuse of minors, to name just a few.

In this context, it should also be mentioned that these days the national legislator is no longer the sole originator of new criminal law norms. The impetus for the creation of new offences increasingly also stems from the international (e.g. the UN) and the supranational (EU) level, which exerts influence on national criminal law.[42] The growing influence of international and supranational law may thus at times also contribute to the expansion of criminal law.

The risk society and the culture of control have clearly reconceptualised criminality as a pervasive risk that needs to be managed and controlled. This has led to a shift in the protective focus and scope of criminal law. While traditional criminal law aimed to protect clear individual interests, such as life, physical integrity, property, etc., modern criminal law increasingly also has as one of its central tasks the protection of (vaguely defined) collective interests like public health, security, public peace and people's trust in the financial system.[43] An increased focus on collective goods may, however, potentially lead to an expansion of criminal law. If the interests criminal law is meant to protect are framed broadly and elusively, more forms of conduct will inevitably be thought to harm or endanger these interests. This also leads to the emergence of a new breed of criminal offences that often criminalise seemingly innocuous forms of conduct and in addition expand criminal law to ever-novel areas and fields of application.[44] Just consider for instance the debate in many European countries about whether the wearing of headscarves in public can and ought to be criminalised.

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[38] See: sections 57 and 58 Terrorism Act 2000, section 89a GCC and Articles 83b and 46 DCC. See also: section 7 of this chapter where we discuss the criminalisation of remote harms.

[39] Article 421 DPC, section 89c GCC and UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

[40] Articles 131 and 132 DCC, sections 1 and 2 Terrorism Act 2006 and sections 129a et seq. GCC. See also on this issue: section 7 in this chapter.

[41] See for instance: A. Ashworth and L. Zedner, 'Preventive Justice' (Oxford University Press 2014), pp. 109–116.

[42] See also: A. Petzsche, 'The European Influence on German Anti-Terrorism Law' German Law Journal (2012), pp. 1056–1065.

[43] See also: D. Roef, 'Strafrechtelijke Verantwoordelijkheid in de Risicomaatschappij' in E. Vos and G.V. Calster (eds.), Risico en voorzorg in de rechtsmaatschappij (2004), p. 208.

Taking a step back and looking at the bigger picture, the notions of the risk society and the culture of control highlight a crucial, yet also contentious issue in criminal law theory. They bring us to the bedrock of the intriguing but always challenging question of when, if at all, it is legitimate and justified to criminalise a certain unwanted behaviour. So let us now explore some of the guiding principles and theories that inform the criminalisation debates, beginning with the principle of individual autonomy.

3. THE PRINCIPLE OF INDIVIDUAL AUTONOMY

Traditionally, liberal criminal justice systems are built on certain principles and values that have created a justificatory framework for the use of criminal laws and punishment. One of the fundamental concepts on which traditional criminal law was built is the principle of individual autonomy. Individual autonomy can be defined as the individual's capacity to be one's own person, to govern oneself, to take (self-directed, independent) action based on one's own reflections and choices.[45] The kernel of the idea of autonomy is thus the right to make (one's own) unfettered choices and decisions.[46]

The concept is strongly influenced by and based on Enlightenment views of limited government and its conception of man as a (free) moral agent and possessor of rights, as 'naturally sovereign'.[47] The law generally ascribes the capacity for autonomous action to all mature, healthy human beings and protecting individual autonomy is therefore a central concern of any liberal criminal justice system.[48]

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[44] Generally see: A. Ashworth and L. Zedner, 'Preventive Justice' (Oxford University Press 2014); D. Husak, 'Overcriminalisation' (Oxford University Press 2008); and E. Luna, 'The overcriminalisation phenomenon' American University Law Review (2005), pp. 703–743.

[45] Generally see: J. Christman, 'Autonomy in Moral and Political Philosophy' Stanford Encyclopedia of Philosophy (Spring 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral. See also: B. Winick, 'On Autonomy: Legal and Psychological Perspectives' Villanova Law Review (1992), pp. 1705–1777, at 1707 et seq.

[46] J. Feinberg, 'Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?' Notre Dame Law Review (1983), p. 454.

[47] J. Feinberg, 'Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?' Notre Dame Law Review (1983), p. 451. B. Winick, 'On Autonomy: Legal and Psychological Perspectives' Villanova Law Review (1992), p. 1708.

[48] See: L.C. Becker, 'Crimes against autonomy: Gerald Dworkin on the Enforcement of Morality' William and Mary Law Review (1999), p. 965.

In the context of criminalisation, the principle of individual autonomy is often related to, if not to a certain extent enshrined in, the harm principle, which will be discussed below. With its focus on individual choice, individual autonomy inter alia militates against legal paternalism and paternalistic legislation. Legal paternalism, briefly put, is the view that the state may limit people's autonomy and right to self-determination as long as this is in their best interest, i.e. to promote their own good. Anti-drug legislation and the obligation to wear seatbelts or helmets on the road may serve as examples here. Arguably, the creation of some offences that restrict people's rights to govern themselves but claim to be for their own good may cause frictions with the principle of individual autonomy. The force of this argument is the strongest with regard to healthy adults, yet arguably loses power in case of legislation aiming to protect the young and vulnerable (e.g. the mentally handicapped or ill) in society.

In any case, autonomy generally requires the independence of one's deliberation and choices and the capacity to rule oneself and make rational decisions.[49] On an empirical as well as philosophical level, this raises the question of when our actions, if ever, can be considered independent, i.e. free. This contentious issue has kept scientists and philosophers busy for centuries, but criminal law generally operates on the assumption that (human) conduct is generally sufficiently free and independent to base liability on it.[50]

On a doctrinal level, individual autonomy is thus an important building block for criminal liability. At the centre of criminal law stands an autonomous (moral) agent, who can be held responsible for the rational choices of wrongdoing that (s)he makes, so it is often argued.[51] The law (and the state) should treat citizens as responsible agents, capable of choosing their own acts and omissions, and can only hold people liable for their individual, free and deliberate actions. This posits individual autonomy as the start and endpoint in criminal law theory, from which all elements of a legitimate criminal justice system traditionally derive.[52] This is also reflected in H.L.A. Hart's famous principle that an individual should not be held criminally liable unless he had the capacity and fair opportunity to do otherwise.[53]

A variety of doctrines of the general part arguably refer to and serve to protect individual autonomy. The concept of actus reus and in particular the doctrines of conduct and causation have as an important goal making sure that people can only be held liable for their voluntary behaviour and the ensuing consequences.[54] The requirement of a violation of a legal duty to act in the context of omission liability serves a similar purpose. Furthermore, the doctrine of mens rea and some defences, such as duress or mistake of law, also work towards the protection of individual autonomy. In the case of duress, for instance, the individual's choices are considered forced and too strongly influenced by factors outside the control of the actor, such that no liability can arise.[55]

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[49] J. Christman, 'Autonomy in Moral and Political Philosophy' Stanford Encyclopedia of Philosophy (Spring 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral.

[50] Generally see: J. Green and J. Cohen, 'For the law neuroscience changes nothing and everything' Philosophical Transactions of the Royal Society of London (2004), pp. 1775–1785; S. Morse, 'The Status of Neurolaw: A Plea for Current Modesty and Future, Cautious Optimism' Court Review (2014), pp. 94–103; A.J. Kobler, 'Will there be a Neurolaw Revolution?' Indiana Law Journal (2014), pp. 807–845.

[51] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 22.

[52] H. Carvalho, 'The preventive turn in criminal law' (Oxford University Press 2017), p. 17.

[53] H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), p. 152.

The problem with individual autonomy is however that it is quite a vulnerable concept. Many things, such as fear of crime or fear of potential victimhood, may be conceived as threatening our self-government and fulfilment (despite falling crime rates).[56] In addition, in the context of terrorism for instance, the individual himself and his freedoms become the major threat. All this leads to increased calls for security by citizens, to which states respond with new sweeping offences. The many new preparatory offences that have been created in the last decade, be they terrorism-related or otherwise, may serve as an example here.[57]

4. THE PRINCIPLE OF WELFARE

In any case, individual autonomy alone cannot account for all the complexities of criminal law; it is certainly not the only pillar on which criminal justice systems are based. While individuals are at the heart of traditional criminal law, these individuals together also form a social community. This creates the need to protect the social conditions that make a fruitful social life possible. Communities give rise to and pursue a variety of collective goals and interests, such as health, safety and the capacity and opportunity to pursue one's own form(s) of happiness. Protecting some collective goals and interests will therefore be inevitable. This principle is often referred to as the principle of welfare, and it essentially holds that individual autonomy needs to be balanced against this principle that highlights the state's duty to create and maintain the social conditions that allow the exercise and flourishing of autonomy.[58]

On first sight, the principle of individual autonomy, with its stern focus on self-government, may seem diametrically opposed to the principle of welfare and its focus on collective goals. It seems obvious that individual goals and interests may not always correspond to what is best for the community as a whole. Accordingly, the interests criminal law seeks to protect will vary, depending on which of the two principles one emphasises.

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[54] For further discussion of the conduct requirement, see: Chapter V.

[55] For a further discussion of duress, see: Chapter VIII.

[56] Generally see: P. Ramsay, 'The insecurity state' (Oxford University Press 2012).

[57] For a further discussion on preparatory offences, see: Chapter IX.

[58] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 26.

Yet, while there can certainly be conflicts between the two principles, this need not always be the case. Especially from a communitarian and social welfare perspective, where the state needs to create and protect an environment, structures and facilities, which are necessary for the full exercise of autonomy by individual citizens, the two principles may work towards the same end.[59]

The danger inherent in the principle of welfare arguably lies in its potential for political abuse. Much will depend, in other words, on how community is construed and which collective interests are accordingly deemed to deserve protection.[60] Hence, thinking in terms of community and collective interests creates in- and outgroups, which carries the risk of discriminating and marginalising 'others', as we have also seen in our discussion of the culture of control. On the flipside of the notion of community is the dangerous or suspect community, which must be managed and policed by the law.[61] Collective goals and interests may therefore – certainly if interpreted broadly – lead to harsh and oppressive laws and policies. Laws that claim to protect a collective interest and promote a common good can, for instance, at the same time discriminate and marginalise certain groups based on factors such as race, ethnicity, class, gender or sexuality.[62] So when do the needs of the many really outweigh the needs of the few?

Likewise, in the name of collective goals and interests, such as protecting public safety and security or public peace, many measures are conceivable that could cause frictions with and undermine fundamental rights and liberties. The creation of new preparatory offences or terrorist offences may again serve as an example here, but also (procedural) investigative measures such as wiretapping, hacking, arrest or stop and search measures without probable cause can be mentioned.

Nevertheless, the protection of certain collective goals and interests by means of criminal law will, as indicated above, be justified and necessary for the flourishing of society and the free development of the individual. Protecting the health, (criminal) justice or taxation system, as well as ensuring safety at work, industrial safety, food and product safety, or the protection of the environment, may for instance all be interests that could be protected by criminal law. If the criminal law is indeed the right tool for these tasks is however an entirely different question.

Just how much collective interests the law ought to protect is however open for debate. Criminal justice systems will, for one thing, differ with regard to which of the two principles (i.e. individual autonomy or the welfare principle) they assign more weight. Traditionally, Western legal cultures have put more emphasis on individualism and individual autonomy, while others (e.g. Eastern and Asian cultures) generally have a tendency towards collectivism and emphasising collective interests.[63]

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[59] See also: N. Lacey, 'State Punishment' (Routledge 1988), pp. 176–181; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 26.

[60] N. Lacey, 'Community in Legal Theory: Idea, Ideal or Ideology?' Studies in Law, Politics and Society (1995), pp. 105–146.

[61] N. Lacey, 'Community in Legal Theory: Idea, Ideal or Ideology?' Studies in Law, Politics and Society (1995), p. 120.

[62] N. Lacey, 'Community in Legal Theory: Idea, Ideal or Ideology?' Studies in Law, Politics and Society (1995), p. 121.

However, differences can also arise between criminal justice systems from the same legal culture. In this context, the different emphases may influence the scope and shape of certain doctrines of the general part. Whether a certain criminal justice system assigns more weight to an individualist conception of human life, emphasising individual autonomy, or rather prefers a communitarian approach, stressing social solidarity, will arguably have an influence on the general approach towards and the scope of omission liability. One case in point here may be the so-called Good Samaritan or easy rescue statutes. As will be discussed later in more detail,[64] failure to rescue a fellow citizen from peril constitutes a criminal offence in Germany and the Netherlands, whereas such an offence has not yet been adopted in the criminal justice system of England and Wales. This difference, as well as the somewhat more hesitant approach towards omission liability in England and Wales, can arguably be explained by the traditionally stronger emphasis on individual autonomy in this system.

The foregoing discussion showed that individual autonomy and the principle of welfare, despite the obvious conflict between the two, need not be polar opposites. Rather, they are connected concepts and can be given different emphases in different criminal justice systems. Based on this, each system can and ought to develop a structured approach as to which individual rights ought to be prioritised and which public interests and goals, under which circumstances, may allow a restriction of individual rights and autonomy. As such, these principles or values inform the function of criminal law and punishment as well as the whole design of criminal law and the criminal process.[65]

Having discussed the principle of autonomy and welfare, we can now start by taking a closer look at one central doctrine relating to issues of criminalisation and the exercise of criminal law power, namely the harm principle.

5. THE HARM PRINCIPLE

A traditional starting point in answering the question what conduct should be criminalised is the harm principle. Closely related to individual autonomy, its original idea is that people should be allowed to do and say what they want unless their conduct is harmful or creates an unreasonable risk of harm to others. Harm to self is not enough grounds for state intervention (paternalism), nor is safeguarding society's moral values (legal moralism).

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[63] Generally see: G. Bierbrauer, 'Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese and Germans' Law & Society Review (1994), pp. 243–264. See also: T. Sommers, 'Relative Justice' (Princeton University Press 2012), pp. 66 et seq.

[64] For a further discussion of easy rescue statutes, see: Chapter. V, section 3.2.

[65] N. Lacey, 'State Punishment' (Routledge 1988), pp. 176–181.

Comparatively speaking, the harm principle has received the widest attention in the Anglo-American legal philosophy, while in the continental criminalisation debate it does not play such an explicit role. In most civil law systems, primarily in Germany, the harm principle's function of justifying and limiting criminalisation is theoretically largely covered by other classical criminal law principles, such as the legality principle, the principle of ultima ratio (criminal law should be a last resort), and most importantly by the theory of legally protected interests or legal goods (*Rechtsgütertheorie*).[66] However, in the Netherlands the harm principle does play a role in criminal policies. For example in recent decades the harm principle has clearly informed the debates about topics as varied as the legalisation of drugs and prostitution, the protection of the environment, and the formulation of terrorist offences.[67]

It is important to make clear from the beginning that there is not just one single, uniform harm principle. The harm principle has a long and varied intellectual history, and it is nowadays widely accepted that there are several variations of the principle.[68] When legal theorists argue for or against the harm principle, we should therefore understand how they actually use it, before we even try to debate what counts as a harm.

5.1. AN EXCLUSIONIST VERSUS AN INCLUSIONIST VERSION OF THE HARM PRINCIPLE

A first distinction is that between an *exclusionist* version of the harm principle and a more modest *inclusionist* one. Some scholars argue that harm should be treated as the sole necessary ground for criminalisation, excluding other possible reasons: no harm, no criminalisation. Others see harm as just one of the valid reasons for penal legislation, which allows the inclusion of other positive grounds to criminalise, such as causing offence to others.[69] The exclusionist view is plainly recognisable in the harm principle as formulated in its canonical form by John Stuart Mill in his work *On Liberty* (1859):

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[66] N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), pp. 95–126.

[67] See for example: L.H.C. Hulsman, 'Kriteria voor strafbaarstelling' in 'Strafrecht te-recht? Over dekriminalisering en decriminalisering' (Uitgeverij in den Toorn 1972); T.A. de Roos, 'Strafbaarstelling van economische delicten. Een crimineel-politieke studie' (Gouda Quint 1987); R. Haveman, 'Voorwaarden voor strafbaarstelling van vrouwenhandel' (Gouda Quint 1998); M. Visser, 'Zorgplichtbepalingen in het milieustrafrecht' (Gouda Quint 2001); C.P.M. Cleiren et al. (eds.), 'Criteria voor strafbaarstelling in een nieuwe dynamiek' (Boom Lemma uitgevers 2012); T. Cleiren and J. Dorst, 'Wetsvoorstel strafbaarstelling misbruik prostitué(e)s die slachtoffer zijn van mensenhandel. Een toets vanuit wetssystematisch en dogmatisch perspectief' Nederlands Juristendblad (2018), pp. 1960–1966.

[68] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 661; J. Edwards, 'Harm Principles' Legal Theory (2014), p. 253.

> 'the sole end, for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'[70]

According to Mill, harm or the threat to harm is the only legitimate (albeit not sufficient) ground to interfere with people's sphere of autonomy.[71] This means that criminalisation is not permissible in order to prevent offensive or immoral, but harmless, conduct, or to prevent conduct on mere paternalistic grounds, that is conduct which, although possibly harmful, may only harm the criminalised person himself.[72]

This strong version of the harm principle is not accepted by many penal theorists today, partly because it is not able to account for criminalisation of conduct that may be harmless but is nevertheless still justifiably criminalised.[73] Take, for example, a simple case of harmless trespassing, where the actor does not destroy or steal anything, and the owner will never become aware of the incident. In what way is this conduct really harmful?[74] Has this behaviour resulted in a negative impact on somebody's life? Moreover, no liberal democracy seems to have serious qualms about criminalising harmless but plainly offensive conduct, such as exhibitionist behaviour or sexual conduct in public spaces. Unless one conflates the conceptual distinction between harm and offence, it seems that the harm principle cannot be the sole legitimate reason for criminalisation. In any case, the extreme view that harmless conduct should never be criminalised, seems problematic. For some authors this is even an argument to replace the harm principle with a rights-centred approach, justifying criminalisation primarily on the basis of the violation of other's rights, such as property and bodily integrity, rather than on the presence of (risk to) harm.[75] Trespassing is then considered to be a crime because it constitutes a pure juridical wrongdoing, regardless of whether it is also harmful.[76] We will come back to this issue later on.

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[69] T.S. Petersen, 'Being Worse Off: But in Comparison with What? On the Baseline Problem of Harm and the Harm Principle' Res Publica (2014), p. 200.

[70] J.S. Mill, 'On Liberty and Other Essays' (Oxford University Press 1991, orig. 1859), p. 14.

[71] N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), p. 36.

[72] J. Stanton-Ife, 'What is the Harm Principle for?' Criminal Law and Philosophy (2016), p. 331.

[73] J. Edwards, 'Harm Principles' Legal Theory (2014), pp. 271–272.

[74] A. Ripstein, 'Beyond the Harm Principle' Philosophy and Public Affairs (2006), pp. 217–218.

[75] T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation.* Hart Publishing: Oxford and Portland', Criminal Law and Philosophy (2016), p. 303; H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 33.

Since Mill wrote, several liberal thinkers and penal theorists, such as Feinberg, Raz and more recently also Simester and von Hirsch, have modified the harm principle into more modest and inclusionist forms. They all defend the view that harm, in one form or another, is a permissible ground for criminalising, but not the only nor a sufficient one. Feinberg, for example, asserts:

> '[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to others than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.'[77]

But alongside harm, he also considers offence to be a legitimate ground for criminalisation, although understandably limited to the most serious cases.[78] So for Feinberg the harm principle is neither a necessary nor a sufficient condition of legitimate criminalisation.[79] He also constrains the harm principle by incorporating in its formulation references to the principle of ultima ratio.[80]

Similarly, Simester and von Hirsch agree with Feinberg that focusing exclusively on harm would be inadequate to justify and limit criminalisation, and that it ought to be supplemented by an offence principle. But more importantly, they argue that a more central role should be given to moral wrongfulness. Their main argument is based on what they consider to be the distinctive nature of criminal law: since punishment entails moral condemnation and censure, and this censure must be deserved, this consequently means that criminal norms may only capture wrongful and blameworthy behaviour.[81] Conduct must necessarily be wrongful to justify its criminalisation. However, since wrongfulness is by itself not sufficient for criminalisation, they also assume that there still ought to be harm-based or other constraints on penal legislation.[82]

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[76] But see also Ripstein, who replaces the harm principle not with a rights-centred approach, but with a so-called sovereignty principle according to which the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other. Although harm may be absent, the trespasser still violates the owner's sovereignty: A. Ripstein, 'Beyond the Harm Principle' Philosophy and Public Affairs (2006), pp. 215–245.

[77] J. Feinberg, 'Harm to Others – The Moral Limits of the Criminal Law' (Oxford University Press 1984), p. 26.

[78] J. Feinberg, 'Harmless Wrongdoing – The Moral Limits of the Criminal Law' (Oxford University Press 1988), p. xix: 'It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offence (as opposed to injury and harm) of persons other than the actor and would be an effective means to that end if enacted.'

[79] J. Edwards, 'Harm Principles' Legal Theory (2014), p. 256.

[80] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 28. See also on the ultima ratio principle: section 10 of this chapter.

[81] A.P. Simester and A. von Hirsch, 'Crimes, Harms and Wrongs. On the Principles of Criminalisation' (Hart Publishing 2011), pp. 22–23; see also: T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation*. Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), p. 303.

5.2. HARM PREVENTION VERSUS HARMFUL CONDUCT

Another important distinction is that between an *instrumental* interpretation of the harm principle, according to which criminalisation is justified (only) in order to prevent harm to others, and a *conduct-centred* interpretation, according to which criminalisation of conduct is (only) justified if it is harmful, or creates an unreasonable risk of harm to others.[83] In short, following the analysis of Duff and Marshall, we have to differentiate between the *harm prevention principle* and the *harmful conduct principle*.[84]

The two principles exemplify a very different relationship between harm and criminalisation. First, what makes the criminalisation permissible is substantially different. If we accept a harm prevention principle, what matters are the consequences intended by the criminalisation itself. This means that the principle can no longer be a legitimate ground for penal legislation if the criminalisation turns out to be a totally ineffective means of preventing harm. On the other hand, if we accept a harmful conduct principle, what matters are only the harmful consequences of the criminalised acts themselves, not that we want harmful conduct to be prevented, nor that we succeed in achieving this.[85] Of course, a combination of the two principles is always possible, in the sense that prohibiting harmful conduct may also be motivated by the prevention of future crimes (general deterrence).[86] The endorsement of one principle does not exclude the acceptance of the other.

Second, and a logical consequence of the former point, the implications are widely different. Since the harmful conduct principle does not depend on the preventive effects of criminalisation, the penal legislator may prohibit conduct that is harmful whether or not it effectively prevents or reduces harm. To illustrate this point, we may refer here to the criminalisation of the use of drugs. When the prohibition of drugs, such as marijuana, does not lead to a reduction in drug use, and even turns out to be counterproductive, the harm prevention principle is clearly not satisfied, even when the harmful conduct principle may still be.[87]

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[82] See also: A.P. Simester and A. von Hirsch, 'On the Legitimate Objectives of Criminalisation' Criminal Law and Philosophy (2016), pp. 367–379; A. von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' Criminal Law and Philosophy (2014), pp. 245–256; J. Stanton-Ife, 'What is the Harm Principle For?' Criminal Law and Philosophy (2016), p. 336.

[83] And as is made clear by inserting 'only' in the formulation of each principle, they can be understood in both the exclusionist and inclusionist way we have just described. See also: J. Edwards, 'Harm Principles' Legal Theory (2014), p. 263; A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 661.

[84] R.A. Duff and S.E. Marshall, '"Abstract Endangerment", Two Harm Principles, and Two Routes to Criminalisation' Bergen Journal of Criminal Law and Criminal Justice (2015), pp. 132–134.

[85] J. Edwards, 'Harm Principles' Legal Theory (2014), p. 264.

[86] R.A. Duff and S.E. Marshall, '"Abstract Endangerment", Two Harm Principles, and Two Routes to Criminalisation' Bergen Journal of Criminal Law and Criminal Justice (2015), pp. 135–136.

However, the reverse is also true. The harm prevention principle may provide legitimate grounds for criminalisation without the harmful conduct principle being fulfilled. The state may want to criminalise harmless conduct in order to prevent harm to others; it may even be the case that certain harms can only be effectively prevented by criminalising conduct that is in itself harmless. This would be very difficult to accept if we only endorse a harmful conduct principle, but it is permissible in view of harm prevention.

This can be well illustrated by the so-called *abstract (or implicit) endangerment* offences. In such offences, the statutory offence description prohibits conduct that is not harmful or poses any concrete risk,[88] but conduct that creates a danger only 'in the abstract', that is, a potential but unjustifiable risk that this conduct is expected to create in the majority of cases.[89] This type of offence is widespread in our highly regulated modern risk society, protecting diverse societal interests, such as the environment and public health and safety. Classic examples are drink-driving, speeding and violation of environmental emission standards, as well as the possession of dangerous objects, such as drugs, weapons or certain chemical substances.[90] Now, the possession of a gun is clearly not harmful in itself, and many people who own a gun would probably never create a concrete risk, but there is evidently still an expected or potential cause of a risk. Thus, although prohibiting unlawful gun possession may not be in agreement with the harmful conduct principle, it is still permissible on the basis of the harm prevention principle.[91] That some diligent gun owners will never make use of their weapon is irrelevant.

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[87] J. Edwards, 'Theories of Criminal Law' Stanford Encyclopedia of Philosophy (Fall 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

[88] In case the offence description prohibits conduct that entails a concrete risk, we would speak of a so-called concrete (or explicit) endangerment offence. See: A. Duff, 'Criminalizing Endangerment' Louisiana Law Review (2005), pp. 959–963; A. Ashworth and L. Zedner, 'Prevention and Criminalization: Justifications and Limits' New Criminal Law Review (2012), p. 557.

[89] B.M. Fissel, 'Abstract risk and the politics of the criminal law' American Criminal Law Review (2014), pp. 658–659.

[90] M.D. Dubber, 'A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment', University of Toronto Faculty of Law Review (2004), p. 38.

[91] J. Edwards, 'Theories of Criminal Law' Stanford Encyclopedia of Philosophy (Fall 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

The same is true for the offence of drink-driving. Consider section 5(1) of the Road Traffic Act 1988, which prohibits driving 'after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit.' Undoubtedly there are many experienced drivers (and drinkers) who are still fit to drive, although their blood alcohol content is above the numerical limit. But the lack of any harmful consequences, or the persons' fitness to drive, is beside the point here. What matters is whether the criminalisation of driving while intoxicated will effectively prevent further harm.[92]

5.3. WHAT COUNTS AS HARM?

Although we have already discussed different variations of the harm principle, we still have not answered the most obvious question of all: what constitutes harm?[93] In many cases it will be quite straightforward when an individual is harmed by another person; no one will doubt the presence of harm when someone is the victim of bodily assault or a burglary. But what about pornography and prostitution, or more trivial cases, such as begging or trespassing?

Arguably, any conception of harm ought to be initially a pre-legal term, a notion that is not from the start fully defined by the law itself, because otherwise this would lead to the problematic conclusion that any norm violation is harmful and therefore a potential candidate for criminalisation.[94] To begin with, and following Feinberg, we could define harm as a 'twarthing, setting back, or defeating of an interest'.[95] When someone is harmed by another person, this means that one or more of his interests are left in a worse state than beforehand.[96]

This obviously raises the question of what counts as an interest and which interests should be protected from harm. Feinberg describes them in a general way as 'all those things in which one has a stake.'[97] Admittedly, this description is rather vague and several legal theorists have attempted to clarify matters. For instance, Simester and Von Hirsch explicitly relate harm to an impairment of a person's resources, which must be understood as 'the longer term means or capabilities that someone possesses',[98] or also as 'those things that one can rely upon to sustain or enhance well-being'.[99] This may not make the notion of 'harm' less ambiguous, but by characterising harm as the impairment of another person's opportunities to engage in worthwhile life projects and relationships, the notion of harm may not that easily be conflated with offensive or immoral behaviour. For example, it is difficult to prove harm (beyond offence) in the case of pornography or homosexuality, as it is obvious that this behaviour does not impair other people's resources that enable them to pursue a good life. On the other hand, it is easy to understand that theft is harmful as this evidently diminishes the opportunities available to the owner by denying him the use of the stolen good.[100] So it is clear that the notion of harm can only be respected, whether we use the harm principle exclusively or inclusively, if it has a meaning different from merely being offensive or immoral.[101] Likewise, if we were to define harm as harm to social welfare (emphasising the welfare principle and communitarian interests), the concept may also become boundless.

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[92] R.A. Duff and S.E. Marshall, '"Abstract Endangerment", Two Harm Principles, and Two Routes to Criminalisation' Bergen Journal of Criminal Law and Criminal Justice (2015), pp. 142–144.

[93] H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 19.

[94] N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), p. 63.

[95] J. Feinberg, 'Harm to Others – The Moral Limits of the Criminal Law' (Oxford University Press 1984), p. 33.

[96] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 662.

[97] F. Feinberg, 'Harm to Others – The Moral Limits of the Criminal Law' (Oxford University Press 1984), p. 34.

5.4. THE ROLE OF WRONGFULNESS

Whether we describe harm as a setback to interests or as an impairment to resources, the mere causing of harm to another is in itself not sufficient. Proponents of the harm principle believe that the harm in question must also be wrongful. Suppose, for instance, that the suspect of a robbery is lawfully arrested by the police and taken into custody. No doubt the (temporary) loss of his freedom constitutes a setback to his interests and his life prospects are impaired. Nevertheless, his arrest was not a wrongful action, and therefore falls outside the scope of criminalisation. Similarly, a company may suffer financial losses as a result of competitive activities in the marketplace, but as long as there is no violation of competition rules, there is no 'wrongful' harm.[102]

It is important to realise that the concept of wrongfulness can have different meanings. We have to distinguish between *morally* wrongful, referring to moral judgments about human conduct, and wrongful in a specific *political-legal* sense as constituting a violation of rights of others.[103] Obviously, the moral wrongfulness of conduct, apart from its harmfulness, plays for legal moralists the central role in guiding criminal policy.[104] But for proponents of the harm principle its main function is limited to that of complementing the notion of harm: criminalisation of harmful conduct is justified if this is also compatible with the (collectively shared) moral judgments about this conduct. By holding that harmful conduct that is not immoral should not be criminalised, a kind of negative (constraining) legal moralism is preserved.[105] The notion of legal wrongfulness, on the other hand, exhibits its constraining role quite independently of people's morality views, and therefore only covers juridical wrongs, types of conduct that have an impact on a person's rights. Although for a lot of crimes moral and legal wrongfulness clearly overlap – murder, rape and bribery are evidently both morally and legally wrong – the distinction remains an important one.

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[98] Quoted in N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), p. 58.

[99] A.P. Simester and A. von Hirsch, 'Crimes, Harms and Wrongs. On the Principles of Criminalisation' (Hart Publishing 2011), p. 37.

[100] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 663.

[101] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), pp. 661–662.

[102] J. Stanton-Ife, 'What is the Harm Principle For?' Criminal Law and Philosophy (2016), p. 335; A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 665.

The necessary nexus between harm and wrongfulness seems to be intuitively self-evident. Most traditional crimes can considered to be wrongfully harmful. However, the simultaneous presence of harm and wrongfulness is not always that evident. The problem is well illustrated by Gardner and Shute's well-known account of what they consider to be the 'pure' case of rape.[106] They discuss the (admittedly rare) example of the rape of an unconscious person who was not physically or psychologically injured, has no memory of what happened, and will therefore never realise that he or she has been the victim of rape.[107] In short, the rape is 'harmless' in the sense that it does not involve a setback of the victim's interests. Like Feinberg, Simester and von Hirsch, Gardner and Shute believe that wrongfulness is a necessary condition for criminalisation and that the harm principle must be satisfied.[108] They follow a political-legal sense of wrongfulness, which they consider to be fulfilled because the perpetrator has made 'sheer use of a person', disregarding the sexual autonomy and humanity of the victim.[109]

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[103] J. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation*. Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), p. 303.

[104] See also on legal moralism: section 6 in this chapter.

[105] See also: A. Duff, 'Theories of Criminal Law' Stanford Encyclopedia of Philosophy (Summer 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

[106] J. Gardner and S. Shute, 'The wrongness of rape' in J. Gardner, Offences and Defences. Selected Essays in the Philosophy of Criminal Law (Oxford University Press 2007), pp. 1–33.

[107] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 29; H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 27.

[108] See: J. Stanton-Ife, 'What is the Harm Principle For?' Criminal Law and Philosophy (2016), p. 340 fn.

[109] J. Gardner and S. Shute, 'The wrongness of rape' in J. Gardner, Offences and Defences. Selected Essays in the Philosophy of Criminal Law (Oxford University Press 2007), pp. 24–25; P. McGorrery, 'The Philosophy of Criminalisation: A Review of Duff et al.'s Criminalisation Series' Criminal Law and Philosophy (2018), p. 200.

But for a proponent of the harm principle, wrongdoing is not enough. If the notion of harm is still expected to guide our criminal policies, how can we consider this rape to be a crime if the victim is not actually harmed, especially when we consider that most legal offence descriptions of rape do not require proof of harm? They argue that what justifies making this sort of rape into a crime is not that it is harmful to the victim itself, but because it is harmful to others if we allow such things to occur.[110] The harm then consists primarily of the justifiable fear of falling victim to a wrong that in itself may be harmless.[111] But is the anxiety or societal unrest caused to others by a harmless activity in itself a sufficient form of actual harm?[112] And in any case, this approach clearly does not take the individual victim seriously.[113] Somehow, it does not seem to give an accurate account of what makes rape a crime.

What this discussion shows is that at least (an exclusionist reading of) the harmful conduct principle is not able to account for all cases of criminalisation, not without diluting or overstretching the harm argument. There are evident wrongdoings that are considered appropriate objects of criminal sanction even though they do not seem to be directly harmful in a significant way.[114] In a less dramatic form, this problem was already illustrated by our trespassing example. Arguably, it is still possible to invoke the harm prevention principle and to criminalise even 'harmless' trespassing and rape as a specific type of dangerous behaviour, in order to prevent other future harm. However, the problem remains that this still does not take the individual (wronged) victim seriously. So it would seem that there are indeed cases where wrongdoing is not only a good reason for criminalisation, but that it may even be a more appropriate ground than what any version of the harm argument can offer. Liberal proponents of the harm principle may object that this may leave the door wide open for penal legislation purely based on morality grounds (legal moralism). However, the kind of 'wrongfulness' at issue here is not a moral one, but consists of a violation of someone's rights, regardless whether the prohibited behaviour also violates some shared morality in our society (which it may still do). Moral wrongdoing is not the same as wrongdoing in a legal sense. Rejecting legal moralism does not imply one has to oppose the criminalisation of juridical wrongs.[115]

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[110] J. Gardner and S. Shute, 'The wrongness of rape' in J. Gardner, Offences and Defences. Selected Essays in the Philosophy of Criminal Law (Oxford University Press 2007), pp. 30–31.

[111] J. Gardner and S. Shute, 'The wrongness of rape' in J. Gardner, Offences and Defences. Selected Essays in the Philosophy of Criminal Law (Oxford University Press 2007), p. 31.

[112] H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 28.

[113] H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 30.

[114] A. Ripstein, 'Beyond the Harm Principle' Philosophy and Public Affairs (2006), p. 217.

[115] H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 30.

5.5. PUBLIC WRONGS

The elements of harmfulness and wrongfulness already give some substance to the harm principle, but they are not enough to explain why wrongful harms (or harmful wrongs) should become matters of the criminal law. Another, third element is needed: the wrongfully harmful conduct must also be a 'public' wrong in order to justify its criminalisation.[116] Whereas 'private' wrongs are matters for the civil law, or may even not be a matter for the law at all, only 'public' wrongs ought to be the concern of criminal law.[117] So what counts as a 'public' wrong?

A rather straightforward meaning of public wrong concerns conduct that harms the 'public' as a whole or threatens the polity's institutions. We may think here of offences against state security, but also of crimes as varied as perjury, tax evasion and social security fraud.[118] What makes these kinds of conduct suitable candidates for criminalisation is that the public interest is directly harmed by generating social instability or creating serious unfairness in relation to one's fellow citizens. When someone commits social security fraud, this will not directly victimise an individual person, but it undoubtedly creates an unfair advantage over other citizens. However, when we usually think of crimes we are inclined to think of examples that victimise specific individuals, such as murder, rape and theft. It is for this type of crimes, which do involve a violation of private interests and individual rights, that a 'public' wrong must entail something more than the protection of public interests, if we want to give an accurate account of why these actions are not just 'private' wrongs.[119] For example, if the harm caused by theft is fundamentally a wrong done to an individual victim, violating her right to property, why should then the state 'steal' the conflict from the victim, by making it a matter of the criminal justice system?[120] Which wrongs done to individuals deserve to be called 'public' in order to be criminally sanctioned?

One may think that the seriousness of the harm is a decisive factor, but there is not always an intrinsic link between the seriousness of harmful wrongs and their private or public dimension. For instance, is stealing a bike or spraying some graffiti (street art for some, but vandalism for the law) really more serious in its harmful consequences than the harm caused by a breach of contract or adultery? Nonetheless, the latter are no concern of the criminal law, while the former are. To understand why actions as murder, rape and theft count as public wrongs, we should not primarily look at the seriousness of the crime, or whether the public is injured too (apart from the actual victim). We have to look at how these individual wrongs are perceived and evaluated by the community itself. According to Duff, a wrongful harm done to individual victims becomes a public wrong when the community no longer perceives it as something that is only their private concern, but recognises it as an issue that belongs to the polity as a whole.[121] We can illustrate this point by returning to our previous rape example. Wherein lies the public element that makes rape something more than merely a private matter? The answer is not just that we believe that punishment is necessary for reasons of deterrence, thus hoping to prevent other citizens from becoming victimised. This reasoning would again depreciate the concrete wrong done to the victim. What matters is that society has come to realise that the wrongs suffered by victims of rape are not just their private business, but that they infringe the interests and values for which the community has a shared and mutual concern. To be sure, the wrong does not cease to be an individual wrong, and it is not denied that individual rights are disregarded, but it has also become a 'shared' wrong.[122]

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[116] A. Ashworth and J. Horder, Principles of Criminal Law (Oxford University Press 2013), p. 29.

[117] A. Duff, 'Theories of Criminal Law' Stanford Encyclopedia of Philosophy (Summer 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

[118] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 29; A. Duff, 'Theories of Criminal Law' Stanford Encyclopedia of Philosophy (Summer 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

[119] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 30.

[120] S.E. Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' Canadian Journal of Law and Jurisprudence (1998), p. 10.

This may also help to explain why marital rape was for such a long time not considered a crime,[123] and also why other forms of domestic abuse were not taken seriously by the criminal justice system, as it was believed that these were private matters. Conversely, we can also understand why adultery is in most modern legal systems not a crime anymore, because no matter how harmful and wrong betraying your marriage may be, adultery is no longer perceived as something for which society has a shared and mutual concern.[124]

We may conclude our discussion of the harm principle by pointing out that its critical function largely depends on whether we embrace an inclusionist or an exclusionist interpretation. A purely harm-centred approach, excluding other positive reasons for criminalisation, is arguably underinclusive in the sense that it is not able to account for criminalisation of conduct that may be harmless but is nevertheless still wrongful and justifiably criminalised. We have also seen that the notion of public wrongfulness plays an important role, not only in explaining why certain conduct is criminalised, but also in guaranteeing that the harm principle keeps its limiting and delimiting function. The distinction between a conduct-centred or a preventive version of the harm principle is also important. Particularly in our modern risk society, the harm prevention principle has the potential to broaden the scope of the criminal law.

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[121] R.A. Duff, 'Towards a Theory of Criminal Law?' Proceedings of the Aristotelian Society (2010), pp. 1–28; A. Duff, 'Answering for Crime. Responsibility and Liability in the Criminal Law' (Hart Publishing 2007), pp. 141–142.

[122] S.E. Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' Canadian Journal of Law and Jurisprudence (1998), pp. 19–21.

[123] Until the case of R v R [1992] 1 AC 599 in 1991, a husband who forced sexual intercourse on his wife without her consent was not guilty of rape. See also: Chapter III, where the marital rape issue will be discussed in light of the legality principle and from the perspective of the European Court of Human Rights.

[124] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 30.

6. CRIMINALISING VIOLATIONS OF MORALITY: LEGAL MORALISM

Our discussion of the harm principle has made clear that most scholars defend an inclusive version of the principle, allowing other (complementary) grounds for legitimate criminalisation, such as causing serious offence to others, but also, and more importantly, moral wrongdoing. We have seen that Simester and von Hirsch, for instance, hold that moral wrongfulness is a necessary (but not sufficient) condition of criminalisation: we ought not to criminalise conduct unless it is morally wrong.[125] They defend a so-called *negative* version of legal moralism, as the absence of moral wrongfulness is a conclusive reason not to criminalise.[126] However, we have left open the separate question as to whether certain violations of morality are in themselves sufficient grounds to criminalise conduct that does not entail any harm.[127] For instance, if society were to consider homosexual acts, infidelity and body piercing to be extremely immoral behaviour, would this justify their criminalisation? This clearly involves a more ambitious *positive* version of legal moralism, as it considers inherent immorality to be a positive reason, and for some legal moralists even a sufficient reason, to criminalise. This gives rise to a conflict not only with the harm principle but also with the above-mentioned principle of individual autonomy.

Undoubtedly the best-known illustration of this position surfaced in England in the 1960s, when the authority of the state to enforce shared morality was seriously questioned. A leading role in this discussion was played by Lord Devlin, who argued strongly for legal moralism.[128] In his view a society's well-being depends on its moral values that are essential for its structural framework.[129] Consequently, moral subversive behaviour threatening the moral consensus, such as homosexuality, which was a burning issue at that time, would lead to social disintegration if left unpunished. The decriminalisation of homosexuality would seriously damage the moral cement that holds the society together.[130] The liberal objection to this view was, and still is, that criminalisation of certain conduct is only legitimate insofar as the conduct creates harm, or the risk of harm, or when its prohibition is instrumental in the prevention of harm. For legal theorists who defend a rights-centred approach, immorality is also not a good enough reason to criminalise: the main justification for penal legislation ought to lie in juridical wrongdoing, in the violation of rights.[131]

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[125] A.P. Simester and A. von Hirsch, 'Crimes, Harms and Wrongs. On the Principles of Criminalisation' (Hart Publishing 2011), p. 30; T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation*. Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), p. 303.

[126] R.A. Duff, 'Towards a Modest Legal Moralism' Criminal Law and Philosophy (2014), p. 218.

[127] W. Wilson, 'Criminal Law' (Harlow Pearson 2014), p. 38.

[128] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 35; A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 671; W. Wilson, 'Criminal Law' (Harlow Pearson 2014), p. 39.

There are several problems with Devlin's type of legal moralism. First, his main argument relies on a debatable concept of morality. In his view immorality can be identified and measured by simply assessing the feelings of ordinary people. However, feelings of disgust or outrage are in themselves unable to determine immoral behaviour and may even be more expressions of irrational prejudice than rational moral judgments.[132] Second, one may doubt whether there is such a thing as a common morality in the first place. There may be shared moral views regarding murder and theft, but in other fields, especially in sexual matters, there is clearly less consensus. Especially in our highly individualised, multicultural society, it is difficult to argue for the criminal enforcement of morals.[133] Whose morality should offer guidance?

Finally, Devlin's legal moralism cannot simply claim that the given conduct is morally wrongful; it also has to provide evidence of an empirical link between immorality and social disintegration.[134] This burden of proof is, however, very often ignored. In that respect, it is interesting to refer to the well-known decision by the House of Lords in *R v Brown*.[135] In this case a group of men were convicted of practising consensual sadomasochistic sexual acts. The House of Lords held that notwithstanding the parties' full consent, it is still an offence to inflict minor bodily harm on another person. A major argument was that, unlike in other practices involving sexual autonomy, such as prostitution, consent could not negate the criminality because sadomasochism involves by definition the infliction of pain and injury.[136] This is not only morally wrong in itself, but 'society is also entitled and bound to protect itself against a cult of violence'. Such activities might even encourage the seduction and 'corruption of young men', so it was argued. However, no data were offered to back up this potential 'moral harm' to individuals and/or the community.[137]

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[129] P. Devlin, 'The Enforcement of Morals' (Oxford University Press 1965), pp. 8–14; H. Stewart, 'The Limits of the Harm Principle' Criminal Law and Philosophy (2010), p. 33.

[130] Arguably, his argument is strictly speaking still somewhat connected with the harm principle, as it is not the immorality of the conduct itself that gives a positive reason for criminalisation, but its potential to undermine social cohesion. See also: A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 671.

[131] T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation*. Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), p. 303–304. See again: sections 5.1 and 5.4 of this chapter.

[132] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 35.

[133] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 672.

[134] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 661.

[135] R v Brown [1994] 1 AC 212.

To conclude, we would like to point out that in some criminalisation debates legal moralism may also lead to an extension, if not an abuse, of the notion of harm. By reinterpreting certain actions that have been traditionally perceived as immoral (pornography, loitering, prostitution, etc.) as harmful ones, or as risks to vague public interests, the harm principle loses its critical bite and the scope of criminal law is definitely broadened.[138] Some scholars even talk about the collapse of the harm principle: 'instead of arguing about morals, the proponents of enforcement are talking about individual and social harms in contexts where, thirty years ago, the harm principle would have precluded regulation or prohibition.'[139] A good illustration of this phenomenon can be found, for example, in recent prostitution debates. Whereas the Netherlands has legalised prostitution, other European countries, such as Sweden and more recently also France, have decided to criminalise the purchase of sexual services. This so-called client criminalisation is strongly motivated by a broad and rather ambiguous use of the notion of harm, because, in addition to the wider problem of combatting the trafficking of women, prostitution is in itself considered to cause harm: to the sex workers, to the clients, to the values of gender equality and emancipation, etc.[140]

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[136] W. Wilson, 'Criminal Law' (Harlow Pearson 2014), p. 40.

[137] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 672.

[138] J. Edwards, 'Theories of Criminal Law', Stanford Encyclopedia of Philosophy (Fall 2018 Edition), E.N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/criminal-law/.

[139] B.E. Harcourt, 'The collapse of the harm principle' The Journal for Criminal Law & Criminology (1999), p. 110.

[140] See: S.-A. Mansson, 'The History and Rationale of Swedish Prostitution Policies', Dignity: A Journal on Sexual Exploitation and Violence (2017), pp. 1–13. It is worthwhile to note that recently also the liberal Dutch prostitution policy has become stricter on similar grounds. See: W. Huisman and H. Nelen, 'The Lost Art of Regulated Tolerance? Fifteen Years of Regulating Vices in Amsterdam' Journal of Law and Society (2014), pp. 604–626; J. Outshoorn, 'Policy change in the Netherlands: From legalization to strict control' Sexuality Research and Social Policy (2012), pp. 233–243; T. Cleiren and J. Dorst, 'Wetsvoorstel strafbaarstelling misbruik prostitué(e)s die slachtoffer zijn van mensenhandel. Een toets vanuit wetssystematisch en dogmatisch perspectief' Nederlands Juristenblad (2018), pp. 1960–1966.

Arguably, one possible way to counter such trends of (widening) criminalisation would be not only to keep the traditional limiting function of the harm principle intact, but also to adopt the aforementioned view that criminal law ought not to be concerned with moral wrongdoing as such, but only with 'public' wrongs. This would incorporate a more modest form of legal moralism into the debate that is not in conflict with a liberal (minimalist) view on criminalisation.[141]

7. CRIMINALISING REMOTE HARMS

We have seen that the state may properly criminalise certain conduct not only when it causes harm, but also if it is likely to cause harm. This presents us with the specific challenge of the criminalisation of so-called *remote harms*.[142] In a general way we can define a person's conduct to be a 'remote harm' when it is harmless in itself but nonetheless creates an opportunity for serious harm that can be caused in the future.[143] Whether or not any harm will occur is not relevant for criminal liability. In Germany the criminalisation of remote harms is fittingly termed *Vorfeldkriminalisierung*, as this involves the preponing of criminal liability even to a pre-inchoate stage.[144]

As we explained at the beginning of this chapter, the problem of prohibiting actions that are not directly harmful but may lead to harm remotely is a particularly acute one in the modern risk society and our culture of control. In our discussion of the harm prevention principle we already touched upon this problem when we described how the state may choose to criminalise conduct that only creates an abstract endangerment, such as the violation of speed limits or drug possession. This type of preventive offence has also become part of anti-terrorism legislation. For example, section 57 of the English Terrorism Act 2000 criminalises the possession of an article for terrorist purposes. No terrorism offence has to be committed. It is sufficient that there are circumstances which give rise to a reasonable suspicion that possession of the article is for a purpose connected with the commission, preparation or instigation of an act of terrorism.[145]

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[141] R.A. Duff, 'Towards a Modest Legal Moralism' Criminal Law and Philosophy (2014), p. 218.

[142] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), p. 667.

[143] A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press), p. 39; See also: J. ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control' Utrecht Law Review (2014), p. 164.

[144] D. Roef, 'Strafrechtelijke verantwoordelijkheid in de risicomaatschappij' in P.L. Bal et al. (eds.), Veiligheid of vergelding (Gouda Quint 2003), p. 39; L. Wörner, 'Expanding Criminal Laws by Predating Criminal Responsibility. Punishing Planning and Organizing Terrorist Attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism' German Law Journal (2012), pp. 1037–1055; U. Sieber, 'Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von Terroristischer Gewalt' Neue Zeitschrift für Strafrecht (2009), pp. 353–364.

However, criminalising endangerment is only one possible way of prohibiting remote harms. There is also another kind of preventive criminalisation, in which the problem of remote harms manifests itself in a different way. We are referring here to so-called *prophylactic* crimes, and more specifically to those cases in which the prohibited conduct may lead to actual harm only because of a subsequent autonomous act committed by another independent person.[146] This situation differs significantly from endangerment offences in the sense that the risk of harm does not arise directly from the prohibited act itself, as is the case with drink-driving, but arises only because of what third parties may eventually do. This means that even neutral, everyday activities, such as the selling of cars and fertiliser, could themselves constitute a remote harm, as other persons may use these objects for criminal purposes. The central question is clearly one of fair imputation: how can we fairly hold people criminally liable for the independent choices of third persons?[147] Individuals ought to be treated as autonomous moral agents who are only to be held liable for the consequences of their own actions, and not for the acts of others, unless there is some link between these acts and the remote harm-doer.[148] The issue is of course how to define that link.

For instance, would it be permissible to criminalise the production of highly violent video games if it were proven that there is a strong correlation between these games and increasing violent behaviour among consumers?[149] Or is it justifiable – free-speech objections aside – that we prohibit the public expression of extremist words or images that create a climate conducive to terrorism? As a rule, a person cannot be held liable, either for a direct or a remote harm, unless he does something wrong, and a person's actions do not suddenly become wrongful only because of the subsequent harm caused by another.[150]

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[145] In addition, this offence reverses the burden proof, which means that the defendant has to prove that his possession of the article was not for such purpose. See also: C. Walker, 'Terrorism and the Law' (Oxford University Press 2011), p. 211; A.E. Bozbayindir, 'The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?' Criminal Law Forum (2018), p. 40.

[146] A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), p. 90.

[147] A. Von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in A.P. Simester and A.T.H. Smith (eds.), Harm and Culpability (Oxford University Press 1996), p. 266.

[148] A. Ashworth and L. Zedner, 'Prevention and Criminalization: Justifications and Limits' New Criminal Law Review (2012), p. 557.

[149] T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation.* Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), pp. 306–307.

[150] A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), p. 90.

This means that there should be some form of *normative involvement* between the act of the remote harm-doer and the harm that other independent parties may cause.

What could possibly count as normative involvement? Essentially it must be conduct that in some sense affirms or underwrites the subsequent third person's criminal actions.[151] The most straightforward cases would be advocacy and encouragement of crimes. But to satisfy the normative involvement requirement the remote harm-doer should also have the intention of advocating or encouraging the criminal actions of others. Mere reckless or negligent contributions to the choices made by others should not be sufficient to establish a normative connection.[152] So when the remote harm-doer's purpose is to encourage others to commit a crime, he is then clearly normatively involved in that crime.[153] A good example is Article 131 DCC, which prohibits any public expression, in writing or through images, that incites another to commit a criminal offence, an act of violence against the authorities, a terrorist offence or the preparation or facilitation of a terrorist offence.[154] Even forms of indirect incitement, such as glorification of terrorism, could be legitimately criminalised if the defendant not only influenced but also endorsed the subsequent choices of the third party. In any case, extreme ideological speech that has no normative link to violence should not give rise to liability.[155] There must be an element of 'emulation' in the prohibited conduct so that activities which merely inspire others to commit crimes or that beget imitation are outside the scope of criminal law.[156] For instance, it would be objectionable to prohibit a television station from reporting on football hooligan violence only because there is a (foreseeable) risk that others may use violence too. There is clearly no endorsement of the harm that others could cause.[157]

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[151] A. Von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in A.P. Simester and A.T.H. Smith (eds.), Harm and Culpability (Oxford University Press 1996), p. 266; D.J. Baker, 'The Moral Limits of Criminalising Remote Harms' New Criminal Law Review (2007), p. 382; A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), p. 99.

[152] D.J. Baker, 'The Moral Limits of Criminalising Remote Harms' New Criminal Law Review (2007), p. 385.

[153] But see how the fault element in some terrorist expression offences includes 'recklessness' (or in civil law systems conditional intent). For instance, section 1 of the Terrorism Act 2006 criminalises publishing a statement that is likely to be understood as a direct or indirect encouragement of terrorism, reckless as to whether such encouragement may take place. See for a more detailed analysis: J. Keiler, 'Terrorist Speech and the Criminal Law – A Comparative Analysis' European Journal of Crime, Criminal Law and Criminal Justice (2017), pp. 247–253. See also: A.E. Bozbayindir, 'The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?' Criminal Law Forum (2018), p. 41.

[154] J. Keiler, 'Terrorist Speech and the Criminal Law – A Comparative Analysis' European Journal of Crime, Criminal Law and Criminal Justice (2017), pp. 247–253.

[155] J. Keiler, 'Terrorist Speech and the Criminal Law – A Comparative Analysis' European Journal of Crime, Criminal Law and Criminal Justice (2017), p. 240.

[156] See also: A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), p. 99–100.

Probably more challenging than encouragement is conduct that facilitates criminal behaviour. As already mentioned, virtually all activities and objects may contribute to the commission of a crime.[158] If someone sells fertiliser to another person, it is always possible that it may be used to create a bomb. Yet it would not be permissible to prohibit the sale of fertiliser. However, there may be instances where the intrinsically dangerous nature of the activity or object justifies criminalisation, even when there is no intent that connects the remote harm-doer to the harmful actions of another. We may think here of supplying goods the core function or purpose of which is to create serious harm, such as bazookas or other anti-personnel weapons, and where the harmful use is evidently not incidental.[159] Supplying such weapons arguably endorses their criminal use, which is evidently not the case when one is selling a car.[160]

To conclude, one could argue that the objective (actus reus) and the subjective (mens rea) elements of a remote harm offence ought to work as communicating vessels if we want to uphold some form of normative involvement. The less unjustifiable (or dangerous) an act seems to be in itself, the more important the role of higher-level fault elements (intent, purpose) in the legal offence description. Conversely, the more unjustifiable the act is in itself, the less important intent becomes and the more acceptable the use of lower-level fault elements, such as conditional intent, recklessness or even negligence.[161]

8. PROTECTING LEGAL GOODS (*RECHTSGÜTER*)

The so-called doctrine of legal good (*Rechtsgut*) can be considered one of the key concepts of German criminal law theory. The concept has several functions in German legal thinking, but on a fundamental level, the concept of a legal good

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[157] Cf. D.J. Baker, 'The Moral Limits of Criminalising Remote Harms' New Criminal Law Review (2007), p. 385.

[158] A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), p. 100.

[159] A.P. Simester and A. Von Hirsch, 'Remote Harms and Non-constitutive Crimes' Criminal Justice Ethics (2009), pp. 100–101.

[160] See also: T. Hörnle, 'Theories of Criminalization. Comments on A.P. Simester/Andreas von Hirsch: *Crimes, Harms and Wrongs. On the Principles of Criminalisation*. Hart Publishing: Oxford and Portland' Criminal Law and Philosophy (2016), pp. 306–307.

[161] J. ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control' Utrecht Law Review (2014), p. 176. See also: A. Ashworth and L. Zedner, 'Prevention and Criminalization: Justifications and Limits' New Criminal Law Review (2012), pp. 555–556.

(or legally protected interest) is generally invoked to define the very scope of criminal law.

8.1. THE CONCEPTUAL DIFFERENCE FROM THE HARM PRINCIPLE

According to the prevalent doctrinal view, criminal law serves the sole but crucial function of protecting legal interests in order to guarantee and assure the peaceful coexistence of citizens. This means that any interest that does not qualify as a legal good can by definition not enjoy protection through the criminal law. In other words, a criminal offence that does not even aim at protecting a legal good is from the outset considered illegitimate.[162] Conversely, a criminal statute that aims to protect a legal good may however still be illegitimate if the norm is not necessary to achieve its end. In the light of the ultima ratio principle, the state may protect a legal good by means of criminal law only if less intrusive means (e.g. civil and administrative law) prove to be insufficient for the protection of the legal good.[163]

If we compare the legal goods theory with the above-mentioned harm-centred approach, the cardinal question for German law with regard to the criminalisation of conduct is not whether a certain behaviour is harmful or threatens harm to others, but rather whether a certain norm can be found to protect a certain general interest worthy of protection. This vantage point arguably differs from other countries as it makes the underlying goal and purpose of a criminal offence central, rather than the (potential) harmful nature of conduct. In this sense, the doctrine of legal goods may be somewhat broader than its Anglo-Saxon counterpart, the already-discussed harm principle.[164] While the two concepts share a common building block, namely that they seek to protect certain 'interests', the doctrine of legal goods may potentially protect a broader set of interests, as it is not only harm to others that may warrant the protection of criminal law, but rather a setback to any legally protected interest.[165] This may for instance allow also paternalistic or moral interests to be included in the sphere of legal protection, which ought to be avoided in a liberal criminal justice system.[166]

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[162] T. Rönnau, 'Grundwissen – Strafrecht: Der strafrechtliche Rechtsgutbegriff' JuS (2009), p. 209.

[163] See also: M. Dubber, 'Theories of crime and punishment in German criminal law' The American Journal of Comparative Law (2005), p. 692. See also on the ultima ratio principle: section 10 of this chapter.

[164] On the harm principle, see: section 5 above.

[165] N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), pp. 104 et seq.

[166] N. Peršak, 'Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts' (Springer 2007), p. 106.

8.2. THE GOALS AND FUNCTION OF THE DOCTRINE OF LEGAL GOODS

The theory of legal goods serves a variety of functions within the German penal system. On the one hand, it is often argued, that the theory plays an important role in the (teleological)[167] interpretation of legal norms, as well as in the (albeit imperfect) systematic classification of the offences of the special part (of the criminal code), in which offences are categorised under different headings (such as crimes against life, crimes against bodily integrity, crimes against personal freedom, crimes against sexual self-determination).[168]

On the other hand, the doctrine also promises to function as an internal constraint on criminalisation. Due to its alleged normative bite, the theory claims to fulfil an inherently critical function by circumscribing the legislator's freedom and determining which conduct ought to be criminalised and which not.[169] In this sense the theory would thus go beyond the realm of positive law and restrict the legislator with regard to the creation of new penal norms.[170] By providing an (objective) criterion for criminalisation, the theory also aims to make decisions to criminalise a certain form of behaviour by the legislator fairer, more transparent and feasible.[171]

Whether the doctrine of legal goods can however meet its own goals and promises is very much up for debate. In particular, the question whether the theory can really function as an internal restraint on criminalisation is hotly debated among German scholars. For many, such a critical normative function of the doctrine remains vital and crucial for German legal theory.[172] Others are however more sceptical and argue that the freedom of the legislator cannot be circumscribed[173] (as long as he remains within the confines set out by the constitution).[174] In any case, the problems and shortcomings of the doctrine arguably already start at the definitional level.

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[167] There are different forms of interpretation that courts may adopt. When applying a teleological interpretation courts interpret legislative provisions in the light of the purpose, values, legal, social and economic goals these provisions, according to the legislator, aim to achieve. European national constitutional courts, as well as the European Court of Human Rights, often apply this method. It is also considered to be the method of interpretation most often utilised by the European Court of Justice.

[168] T. Rönnau, 'Grundwissen – Strafrecht: Der strafrechtliche Rechtsgutbegriff' JuS (2009), p. 211, J. Eisele in A. Schönke and H. Schröder, Kommentar zum StGB (Verlag C.H. Beck 2014), Vorbem. §§13ff, Mn 9a.

[169] J. Eisele in A. Schönke and H. Schröder, Kommentar zum StGB (Verlag C.H. Beck 2014), Vorbem. §§13ff, Mn 10. See also: S. Swoboda, 'Die Lehre vom Rechtsgut und ihre Alternativen' ZStW (2010), pp. 24–50.

[170] W. Hassemer and U. Neuman in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), Nomos Kommentar, Strafbesetzbuch (Nomos Verlag 2017), Vorbem. §1, Mn 110–115.

[171] W. Hassemer and U. Neuman in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), Nomos Kommentar, Strafbesetzbuch (Nomos Verlag 2017), Vorbem. §1, Mn 110–115.

[172] See for instance: C. Roxin, 'Strafrecht Allgemeiner Teil 1' (Verlag C.H. Beck 2006), pp. 8 et seq.; G. Kett-Straub and H. Kudlich, 'Sanktionenrecht' (Verlag C.H. Beck 2017), pp. 2 et seq.

[173] This was also the view of the Constitutional Court in its infamous incest decision. The legislator, so the argument went, cannot be restricted by appealing to supposedly pre-existing

8.3. PROBLEMS OF THE THEORY OF LEGAL GOODS

In general, all human interests worthy of protection by means of criminal law can be subsumed under the term 'legal good'.[175] Thus, a legal good is a good which a community, governed by the rule of law, recognises as being necessary for individual (or social) welfare and which therefore merits protection by the law from conduct that seriously threatens it. Which goods, interests and values qualify as legal goods in the German penal system is however a bone of contention and a plethora of different definitions have been proposed. Roxin for instance defines a legal good as any condition or determination of aims that are necessary for either the free development of the individual, the realisation of his basic rights or the functioning of a state that is built on these objectives.[176]

The difficulty here arguably lies in developing a definition that can cover all legitimate criminal offences but that avoids losing its critical edge by becoming overly broad.[177] In any case, the exact scope of the concept remains unclear in border areas and especially with regard to the identification of new interests that deserve the criminal law's protection. Traditionally, as we have already mentioned, the law focused on important individual goods and until quite recently there was wide consensus that the criminal law should proscribe conduct that directly harms or threatens such individual interests. Thus, human life, bodily integrity, sexual autonomy, personal freedom of action and movement and property are generally all considered legal goods that criminal law ought to protect.[178] An exclusive focus on individual interests and individual autonomy

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legal goods. The theory contained, according to the Constitutional Court, no standards that could enrich constitutional law, being the only source of law that can circumscribe the power of the legislator. See: BVerfG, 26 February 2008, 2 BvR 392/07, para 38 et seq. See also: L. Greco, 'Was lässt das Bundesverfassungsgericht von der Rechtsgutlehre übrig? Gedanken anlässlich der Inzestentscheidung des Bundesverfassungsgerichts' Zeitschrift für Internationale Strafrechtsdogmatik (2008), pp. 234–238.

[174] For a critical evaluation of the theory of legal good see for instance: O. Lagodny, 'Fallstricke der Strafrechtsvergleichung am Beispiel der deutschen Rechtsgutlehre' Zeitschrift für Internationale Strafrechtsdogmatik (2016), pp. 672–680.

[175] W. Hassemer and U. Neuman in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), Nomos Kommentar, Strafbesetzbuch (Nomos Verlag 2017), Vorbem. §1, Mn 144.

[176] C. Roxin, 'Strafrecht Allgemeiner Teil 1' (Verlag C.H. Beck 2006), p. 16. M. Dubber, 'Theories of crime and punishment in German criminal law' The American Journal of Comparative Law (2005), p. 685.

[177] T. Rönnau, 'Grundwissen – Strafrecht: Der strafrechtliche Rechtsgutbegriff' JuS (2009), p. 210.

[178] Generally see: M. Dubber, 'Theories of crime and punishment in German criminal law' The American Journal of Comparative Law (2005), pp. 684 et seq.

will however not do, as this would exclude the protection of collective goods or social welfare interests from the realm of criminal law.[179] As the protection of collective goods has however become much more important in modern society, this would lead to unwanted lacunas in the law. In our discussion of the harm principle, we also referred to this problem of the nature of the interests that ought to be protected via criminal law.

To create room for the protection of collective goods as well, two approaches are conceivable. One can, on the one hand, emphasise individual autonomy and recognise collective goods only as worthy of protection insofar as they serve the personal development of the individual. Alternatively, one can also put social welfare interests first and start with the idea that individuals live peacefully together in one state. From this collective good (i.e. the state) it is then possible to subsequently also derive individual interests (such as life, bodily integrity, etc.) that are considered part and parcel of the function of the state.[180]

While these different approaches do create some room for the protection of collective legal goods, the issue nevertheless remains difficult and contested. Much more controversial contestants for the status of a legal good are therefore interests such as the environment, national security, the fair administration of justice, the protection of the financial market, the protection of trust in the functioning of markets[181] (which may be threatened by insider dealing) and doping[182] (self-administered or carried out by a trainer or sports physician).

The frictions between individual autonomy and the principle of welfare thus become particularly visible within the theory of legal goods once the protection of collective legal goods is at stake. In the context of preventing terrorist offences, German law seems for instance to emphasise communitarian interests by holding that terrorism constitutes an attack on (the security) of the state (a collective good). With regard to §89a GCC and the criminalisation of preparatory conduct to a terrorist attack, individual interests such as life and health are thus only indirectly protected.[183] This is because other offences already (sufficiently) protect these (individual) interests and arguably because at the preparatory stage the danger to them is remote and abstract at best.

The traditional focus on individual (human) interests also causes problems in other areas of the law. A stern focus on individual interests can for instance

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[179] W. Hassemer and U. Neuman in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), Nomos Kommentar, Strafbesetzbuch (Nomos Verlag 2017), Vorbem. §1, Mn 117.

[180] W. Hassemer and U. Neuman in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), Nomos Kommentar, Strafbesetzbuch (Nomos Verlag 2017), Vorbem. §1, Mn 128.

[181] K. Beckemper, 'Das Rechtsgut "Vertrauen in die Funktionsfähigkeit der Märkte"' Zeitschrift für internationale Strafrechtsdogmatik (2011), pp. 318–323.

[182] D. Sternberg-Lieben, 'Einwilligungsschranken und Rechtsgutvertauschung am Beispiel des Fremddopings im Sport' Zeitschrift für internationale Strafrechtsdogmatik (2011), pp. 583–601.

[183] J. Schäfer in Münchner Kommentar zum StGB (Verlag C.H. Beck 2017), §89a, Mn 3.

not explain why cruelty to animals is punishable by a prison sentence of up to three years, pursuant to §17 of the Animal Protection Act (*Tierschutzgesetz*). Similarly, the protection of the environment as a collective good has caused problems in German criminal law doctrine. If a legal interest can only cover human interests, then protecting the environment as such, and not only because pollution threatens human health, seems to prima facie fall outside the scope of criminal law, although not necessarily outside any other form of regulation. Furthermore, the collective good of 'the environment' seems so broad and general that the scope of criminal law threatens to become limitless in this context. To overcome these problems and to justify the creation of environmental offences, now enshrined in §§324–330 of the GCC, the prevalent view therefore evokes two legal interests, namely ecological and human interests.[184] Although these offences are thought to protect the environment, they do not protect it in its entirety. To make the protected legal interest more concrete, certain segments of the environment, such as water, soil, air, wildlife and flora, are protected. Moreover, these interests are not protected for their own sake, but only insofar as they constitute the natural livelihood of man. Thus, the environment only enjoys protection as far as its utility for humans goes.[185] The underlying ecological and human interest can however receive different emphasis in different environmental offences. In §§324 (pollution of water) and 329 GCC (endangering protected areas) the ecological interests seem to be more dominant, while §§325 and 326 GCC show more clearly a link to human welfare and thus highlight the aforementioned twofold rationale.[186] §§330(2) (aggravated cases of environmental offences) and 330a GCC (causing a severe danger by releasing poison) on the other hand, seem to exclusively protect individual human interests.[187]

In any case, we see here that the discussion regarding which legal goods ought to be protected leads to a compromise between human and ecological interests in the context of environmental crime. The traditional focus on individual (human) interest however remains clearly visible even in a field where a non-anthropocentric approach would perhaps be more convincing.

One further aspect that the doctrine of legal goods struggles with at times is offences that criminalise certain social sentiments and taboos. It is generally recognised, as in the aforementioned common law discussion on legal moralism, that morality alone will generally be insufficient to qualify a certain interest as a legal good in German law and that the mere immorality of certain behaviour is insufficient to warrant the application of criminal law. Accordingly, the doctrine of legal goods has in the past successfully been invoked to decriminalise certain moral offences such as homosexual intercourse and the distribution of pornography.[188] Nevertheless, some offences, such as §§167a (disturbing a funeral) or 183 GCC (exhibitionism), still seem to come very close to criminalising social mores, but are frequently justified by invoking the (dubious) legal interest of protecting public peace.[189]

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[184] R. Schmitz in Münchner Kommentar zum StGB (Verlag C.H. Beck 2014) Vorbem. §§324ff, Mn 18. See also: G. Heine and B. Hecker in A. Schönke and H. Schröder Kommentar zum StGB (Verlag C.H. Beck 2014), Vorbem. §§324ff, Mn 8.

[185] R. Schmitz in Münchner Kommentar zum StGB (Verlag C.H. Beck 2014) Vorbem. §§324ff, Mn 18.

[186] R. Schmitz in Münchner Kommentar zum StGB (Verlag C.H. Beck 2014) Vorbem. §§324ff, Mn 18 et seq. See also: G. Heine and B. Hecker in A. Schönke and H. Schröder Kommentar zum StGB (Verlag C.H. Beck 2014), Vorbem. §§324ff, Mn 8.

[187] R. Schmitz in Münchner Kommentar zum StGB (Verlag C.H. Beck 2014) Vorbem. §§324ff, Mn 25.

The limits of criminal law and the alleged criminalisation of immoral behaviour also came under scrutiny in a decision of the Constitutional Court in which §173 GCC (sexual intercourse between relatives),[190] which prohibits incest, was challenged. In this case, the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) was tasked to decide whether the prohibition of sexual intercourse between siblings (§173(2) GCC) was in line with the German Constitution (*Grundgesetz*) and served to protect (legitimate) legal interests.[191] In this case the defendant (born in 1976) had only met his natural sister (born in 1984) in 2000. They became a couple, and in the years to come four children were born out of this relationship.[192] The complainant had previously already been found guilty of violating §173 GCC and was in the case that gave rise to the constitutional complaint again convicted and sentenced to a term of imprisonment of one year and two months. In a controversial and hotly debated decision, the Constitutional Court found that §173 GCC passed constitutional muster and that the legislator had with this provision not strayed beyond what was permissible pursuant to the Constitution. It held that the prohibition of incest, although restricting the freedoms and right to sexual self-determination of citizens, was nevertheless justified as it served to protect three legitimate values or interests respectively.[193] According to the Court, the provision serves to protect the institution of marriage and the family, as required by Article 6 of the Constitution, by preserving the family order from the damaging effects of incest. Furthermore, the norm sought to, secondly, serve the protection of the 'inferior' partner in incestuous relationships by protecting his/her right to sexual self-determination, and thirdly it served eugenic purposes by seeking to prevent serious genetically-based diseases from which the offspring of incestuous relationships may suffer.[194]

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[188] See also: G. Kett-Straub and H. Kudlich, 'Sanktionenrecht' (Verlag C.H. Beck 2017), p. 2; M. Dubber, 'Theories of crime and punishment in German criminal law' The American Journal of Comparative Law (2005), p. 684.

[189] S. Swoboda, 'Die Lehre vom Rechtsgut und ihre Alternativen' ZStW (2010), p. 39.

[190] Section 173 GCC reads as follows:

'(1) Whoever completes an act of sexual intercourse with a consanguine descendant shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever completes an act of sexual intercourse with a consanguine relative in an ascending line shall be punished with imprisonment for not more than two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who complete an act of sexual intercourse with each other shall be similarly punished.

(3) Descendants and siblings shall not be punished pursuant to this provision if they were not yet eighteen years of age at the time of the act.'

[191] See: BVerfG, 26 February 2008, 2 BvR 392/07. For an English translation of some central parts of the case see: M. Dubber and T. Hörnle, 'Criminal law – A comparative approach' (Oxford University Press 2015), pp. 123 et seq.

[192] BVerfG, 26 February 2008, 2 BvR 392/07, para 22.

This judgment arguably highlights some of the shortcomings and the fluidity of the doctrine of protected legal interests. None of the arguments proffered by the Court in defence of §173 GCC is arguably beyond doubt.[195] It seems for instance unclear how an incestuous relationship between adult siblings, whose original family had fallen apart years ago, can threaten established family orders and structures. Admittedly, the argument seems stronger with regard to the general constitutionality of the norm as such, but in the particular case at hand, it arguably remains not fully convincing. Moreover, the eugenic argument may in the German legal system not only be considered problematic from a historical perspective, but it is furthermore not undisputed from a scientific perspective.[196] In any case, the Court used the aforementioned arguments to prove that §173 GCC was not (exclusively) based on moral or ethical considerations and was therefore in line with the Constitution. In a carefully drafted dissenting opinion, Judge Hassemer argued however forcefully that the provision mainly protected social mores and that more restrictions ought to be imposed on the legislator in relation to the creation of criminal offences.[197]

The doctrine of legal goods thus struggles at times to achieve sufficient certainty; its open nature may circumscribe its critical, limiting and facilitating function. It is therefore sometimes submitted that the doctrine could be improved and made more concrete by combining it with the common law harm principle.[198]

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[193] BVerfG, 26 February 2008, 2 BvR 392/07, paras 41–50. See also: M. Dubber and T. Hörnle, 'Criminal law – A comparative approach' (Oxford University Press 2015), pp. 125 et seq.

[194] See also: M. Dubber and T. Hörnle, 'Criminal law – A comparative approach' (Oxford University Press 2015), pp. 125 et seq.

[195] Generally see: T. Hörnle, 'Das Verbot des Geschwisterinzests – Verfassungsgerichtliche Bestätigung und verfassungsrechtliche Kritik' NJW (2008), pp. 2085–2088.

[196] T. Hörnle, 'Das Verbot des Geschwisterinzests – Verfassungsgerichtliche Bestätigung und verfassungsrechtliche Kritik' NJW (2008), pp. 2085–2088.

[197] BVerfG, 26 February 2008, 2 BvR 392/07, paras 73–123. See also: M. Dubber and T. Hörnle, 'Criminal law – A comparative approach' (Oxford University Press 2015), pp. 128 et seq.

[198] See for instance: S. Swoboda, 'Die Lehre vom Rechtsgut und ihre Alternativen' ZStW (2010), p. 37.

9. CRIMINALISATION AND HUMAN RIGHTS

Another principle that shaped liberal criminal law and can be seen as one of its cornerstones is respect for human rights. If the autonomous individual is at the heart of traditional criminal law then the protection of certain fundamental individual rights seems warranted and necessary. The protection of human rights often is part and parcel of national constitutions, but also on the international level an increase in agreements and treaties promoting the protection of human rights emerged in the aftermath of World War II. As the protection of human rights became a central task of liberal justice systems, it also became common ground that criminal law ought to respect human rights. Accordingly, criminal offences should protect fundamental rights such as the right to life.

The right to life is one of the most fundamental values that criminal law arguably ought to protect. This right is for instance enshrined in Article 2 of the ECHR and in Article 3 of the Universal Declaration of Human Rights. On a basic level, criminal law protects the right to life through the offence of murder, one of the oldest crimes in the book. However, the influence of the right to life on criminal law arguably goes further. It also (co-)determines, for instance, under which circumstances and how the use of lethal force by the police may be justified.[199]

Moreover, the right to life, being one of the most fundamental human rights, may also have an impact on the interpretation and corresponding scope of certain criminal law doctrines. As will be discussed in more detail in Chapter VIII, one case in point here may be the doctrine of self-defence. The use of force in self-defence is generally thought to be compatible with the right to life as every citizen enjoys a right to defend him- or herself against wrongful aggression. Using lethal force in self-defence is however only permissible when it is necessary. The doctrine of self-defence translates this requirement into criminal law, generally requiring the existence of an unlawful attack. In some jurisdictions, this is assessed objectively, but in some countries unreasonably believing that one is being attacked can also give rise to the right to self-defence. One may however question whether such a doctrinal approach does not in fact fail to protect the right to life of the unfortunate person who is mistaken for an attacker.[200]

Furthermore, according to the ECHR, states should not only refrain from the intentional and unlawful taking of life, but also take appropriate steps to safeguard the lives of those within their jurisdiction, in particular by putting in place effective criminal law provisions backed up by law enforcement machinery.[201] This means that in some situations the protection of fundamental human rights, and in particular the right to life, may impose a positive obligation on states to take appropriate steps to safeguard citizen's fundamental human rights by means of criminal law.[202] Thus, the protection of fundamental rights may at times require the criminalisation of behaviour that jeopardises these rights.

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[199] In the context of the ECHR see for instance: McCann and others v United Kingdom, Appl. No. 18984/91, 27 September 1995; Nachova and others v Bulgaria, Appl. No. 43577/98, 6 July 2005; Soare and others v Romania, Appl. No. 24329/02, 22 February 2011.

[200] See for instance: F. Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' Criminal Law Review 2002, pp. 347–362.

As well as the right to life, other rights, such as the right to freedom of thought, expression, religion and assembly, as well as the right to privacy and non-discrimination, are also generally thought to enjoy protection by criminal law. This does not however mean that criminal offences may under no circumstances circumscribe or limit one of these rights. A good example here may be the right to freedom of expression. The degree of protection granted to the right to freedom of expression generally varies from state to state. While in some countries, such as the US, freedom of expression enjoys a rather wide scope of protection, European countries have traditionally been more willing to impose legal restrictions on freedom of speech. However, even in the US the Supreme Court has held that speech that 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action', is not protected under the First Amendment.[203]

Within the context of the ECHR, limitations of freedom of speech are also permissible. This is the case if the restrictions are prescribed by law, serve a legitimate aim (e.g. the protection of the reputation or rights of others), are necessary in democratic society (meaning that there exists a pressing social need), the reasons provided for criminalisation are relevant and sufficient, and the measure is proportionate to the aim pursued.[204]

As the ECtHR held in *Erbakan v Turkey*:

> 'Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued'.[205]

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[201] See: L.C.B. v the United Kingdom, Appl. No. 23413/94, 9 June 1998; Osman v the United Kingdom, Appl. No. 23452/94, 28 October 1998.

[202] See in this context also: Öneryildiz v Turkey, Appl. No. 48939/99, 30 November 2004; Budayeva and others v Russia, Appl. Nos. 15339/02, 21166/02, 11673/03 and 15343/02, 20 March 2008.

[203] See: Brandenburg v Ohio, 295 U.S. 444 (1969).

[204] See: M. van Noorloos, 'Criminalising defamation of religion and belief' European Journal of Crime, Criminal Law and Criminal Justice (2014), pp. 360 et seq.

[205] Erbakan v Turkey, Appl. No. 59405/00, 7 July 2006, para 56.

On this basis, offences criminalising public incitement to ethnic, racial and religious hatred,[206] incitement to violence and verbal support for terrorist activity[207] have been found to be in accordance with the freedom of expression. Speech that directly calls for violent action, much like in the US, thus falls outside the protection of the ECHR. However, speech with much more tenuous links to violence can also be reconciled with freedom of speech. So, for instance, laws prohibiting the denial of the Holocaust[208] and laws prohibiting the glorification of terrorism have all been accepted by the ECHR.[209] In addition, laws criminalising the defamation of religion and belief or incitement to religious intolerance have passed ECHR muster in the past.[210]

Where to draw the line between permissible and impermissible speech in general and how to properly respect human rights when enacting criminal laws is a very contentious issue. Some rights, such as the right to life and the right against torture and degrading treatment, are more fundamental than others, and therefore carry more weight in criminalisation debates and also require more protection by the legislator. Other fundamental rights, such as freedom of speech or the right to privacy, seem to be a bit more malleable and allow more room for limitations.

While criminal law thus in general ought to respect human rights, limitations to some fundamental rights remain nevertheless possible if, viewed from the perspective of the principle of welfare, this is deemed necessary in a democratic society.

10. THE ULTIMA RATIO PRINCIPLE: CRIMINALISATION AS THE LAST RESORT

Even when there are persuasive positive reasons that make certain conduct a suitable candidate for criminalisation, it is nonetheless necessary to consider whether there are still some negative reasons. Arguably, the traditional principle of ultima ratio, prescribing that criminal law should be employed only as the last resort, is the best-known reason not to criminalise. Now that we are approaching the end of this chapter, it seems only logical that we should give some thought to this important constraining principle. What is its meaning? How can it be applied? And why should we accept it in the first place, especially when we have to admit that penal legislators are often inclined to use criminal law as a primum rather than as an ultimum remedium in remedying social problems?[211]

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[206] Pavel Ivanov v Russia, Appl. No. 35222/04, 20 February 2007.

[207] Roj TV A/S v Denmark, Appl. No. 24683/14, 17 April 2018.

[208] Garaudy v France, Appl. No. 65831/01 24 June 2003, and Honsik v Austria, Appl. No. 25062/94, 18 October 1995.

[209] On the glorification of terrorism see: J. Keiler, 'Terrorist Speech and the Criminal Law – A Comparative Analysis' European Journal of Crime, Criminal Law and Criminal Justice (2017), pp. 230–259.

[210] See for instance: M. van Noorloos, 'Criminalising Defamation of Religion and Belief' European Journal of Crime, Criminal Law and Criminal Justice (2014), pp. 351–375.

10.1. WHY SHOULD CRIMINAL LAW BE THE LAST RESORT?

The basic meaning of the ultima ratio principle is easy to understand: criminal law should not be used when other legal means, such as administrative sanctions or tort liability, and non-legal means, such as education and advertising, are sufficient to protect legitimate values and interests.[212] There are several reasons why criminal law ought to be the last resort.

First, there is a very pragmatic, utilitarian reason. Amongst criminal law scholars and criminologists there is a shared concern that criminal law not only suffers from overcriminalisation, but that, in addition, criminal sanctioning may have negative economic and societal effects. If the control costs for penal legislation are too high, and the criminal justice system does not have the resources for effective law enforcement, this can be an important reason to employ non-penal means instead.[213] It may also be that criminalisation is so counterproductive, causing more harm than it can remedy, that it should only be used as a last resort.[214] These pragmatic reasons are evidently not principled objections to penal legislation, but they are nonetheless very valid ones. Consider the example of using criminal law to combat the spreading of HIV/AIDS, which in some legal systems has actually resulted in specific criminal statutes.[215] If it is shown that criminalisation does not reduce unsafe behaviour that is likely to spread HIV/AIDS, and even leads to adverse side-effects (people becoming more reluctant to be tested, marginalisation of vulnerable groups like sex workers, etc.) we have a compelling argument to use alternative means, including education and awareness campaigns.[216]

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[211] D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), p. 208.

[212] N. Jareborg, 'Criminalisation as Last Resort' Ohio State Journal of Criminal Law (2005), pp. 524–525.

[213] We would then invoke what Jareborg calls the 'utility principle' according to which 'one must assess the weight of arguments concerning need, control costs and inefficiency.' N. Jareborg, 'Criminalisation as Last Resort' Ohio State Journal of Criminal Law (2005), p. 530.

[214] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), pp. 680–681.

[215] See: J.K. Strader, 'Criminalisation as a policy response to a public health crisis' The John Marshall Law Review (1994), p. 438; E. Mykhalovski, 'The public health implications of HIV criminalization: past, current, and future research directions' Critical Public Health (2015), pp. 373–385. See also on HIV cases in criminal law: Chapter VII.

However, mere pragmatic arguments in support of the ultima ratio principle do not normatively explain why it is not justifiable that people are punished for a crime that is not a last resort.[217] We need more substantive reasons that justify the ultima ratio principle, regardless of whether criminal law is or is not successful in achieving a legislative objective. A second, more principled reason is therefore directly related to the repressive nature of criminal law itself. As we saw in the previous chapter, criminal law is essentially characterised by, and significantly differs from other fields of law because of, the intrinsic punitive nature of its sanctions. Because criminal sanctions, particularly imprisonment, are the most intrusive means of legal enforcement, and involve an intentional infliction of suffering by the state on its citizens, criminalisation can only be justified as the ultima ratio (even where its use would not be too costly or counterproductive).[218]

A third and final reason is that the state should only use criminal law when this is in agreement with the requirements of a *Rechtsstaat* and respecting the individual rights of its citizens. The rule of law requires that criminal law may only impose certain limitations on fundamental rights and liberties, including the liberty not to be subjected to punishment, when it is unavoidable for the protection of certain legitimate interests. It is interesting to note that, comparatively speaking, this fundamental rights perspective on ultima ratio plays a central role in German criminal law, and even has a certain constitutional status, while in the English common law doctrine the principle is mainly understood as a moral maxim inherent in a minimalist approach to criminal law.[219] The strong connection in Germany between the principle of last resort and constitutionally protected fundamental rights, is well illustrated in some decisions from the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG). Arguably, the best-known case where the Court made reference to the ultima ratio principle, when reviewing the constitutionality of penal legislation, is a notorious anti-abortion decision from 1975.[220] The Court treated ultima ratio as an instance of the proportionality principle, and after having weighed all the conflicting fundamental values and freedoms against each other, decided in favour of criminalising late abortions.[221] It is worth quoting from the Court's decision the following pivotal argumentation:

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[216] E. Mykhalovski, 'The public health implications of HIV criminalization: past, current, and future research directions' Critical Public Health (2015), pp. 373–385; A. Mears, 'The criminalization of HIV transmission in England and Wales: a brief review of the issues arising' Current Opinion in Infectious Diseases (2007), pp. 47–53.

[217] D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), p. 229.

[218] S. Melander, 'Ultima Ratio in European Criminal Law' Oñati Socio-Legal Series (2013), p. 45; N. Jareborg, 'Criminalisation as Last Resort' Ohio State Journal of Criminal Law (2005), pp. 524–525.

[219] See for example: Ashworth and Horder who discuss the principle of last resort as an element of the minimalistic approach: A. Ashworth and J. Horder, 'Principles of Criminal Law' (Oxford University Press 2013), p. 33. See on the similarities and differences between the continental (German) approach and the Anglo-American approach: P. Minkkinen, '"If Taken in Earnest": Criminal Law Doctrine and the Last Resort' The Howard Journal (2006), pp. 524–531.

> 'The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they be in civil law or in public law, especially of a social legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the "ultimate reason" in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in other ways. The worth and the importance of the legal value to be protected demand this. It is not a question of an "absolute" duty to punish but rather one of a "relative" duty to use the penal sanction, which grows out of the insight into the inadequacy of all other means.'[222]

In later decisions, the Court also clearly held that criminalisation should not be used as a primum remedium and is therefore subject to the general principle of proportionality.[223] In any case, the principle of last resort can be interpreted as an in dubio pro libertate principle, meaning that just as a judge is subject to the principle of in dubio pro reo and may not convict someone without proof of guilt, the legislator ought not to criminalise certain kinds of conduct without evidence that criminalisation is really appropriate.[224] The burden of proof evidently lies with those who plea for penal legislation.[225]

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[220] BVerfGE 39, 1, pp. 45–46.

[221] See: K. Tuori, 'Ultima Ratio as a Constitutional Principle' Oñati Socio-Legal Series (2013), pp. 6–20.

[222] Para. III, 2b. Translation by Robert E. Jonas and John D. Gorby in R.E. Jonas and J. Gorby, 'West German Abortion Decision: A contrast to Roe v. Wade' The John Marshall Journal of Practice and Procedure (1976), p. 646.

[223] A detailed analysis of case law is discussed in Y.-C. Yoon, 'Strafrecht als ultima ratio und Bestrafung von Unternehmen' (Peter Lang 2001).

[224] E.W. Hanack, 'Zur Revision des Sexualstrafrechts in der Bundesrepublik' (Rohwolt 1969), p. 37; N. Jareborg, 'Criminalisation as Last Resort' Ohio State Journal of Criminal Law (2005), p. 531; Y.-C. Yoon, 'Strafrecht als ultima ratio und Bestrafung von Unternehmen' (Peter Lang 2001), pp. 44–51.

[225] P. Minkkinen, "If Taken in Earnest': Criminal Law Doctrine and the Last Resort' The Howard Journal (2006), p. 526.

10.2. ULTIMA RATIO AND THE FUNCTIONS OF CRIMINAL LAW

That idea that criminal law may not be used when there are other more effective means to achieve the penal legislator's objective seems quite straightforward. However, as is pointed out by Husak, we cannot begin to implement the ultima ratio principle if we do not know what legislative objective we want to achieve.[226] It is impossible to decide whether criminal law is better or worse than other legal or non-legal means, if we do not have clarity on the purpose of criminalisation. How can we evaluate the 'ultima' of criminal law if we do not agree upon its 'ratio'?

Let us assume that we consider harm prevention to be the sole objective of criminal law; the reason for criminalisation is to prevent certain kinds of harmful conduct and achieve a significant reduction in crime.[227] Obviously, we will then also employ a *preventive interpretation* of the ultima ratio principle: criminal law should only be used as a last resort to prevent certain conduct. If alternatives to prevent the given conduct would work as well or even better, the legislator should not opt for criminalisation.[228] The alternative techniques ought to be employed first, like tax law, administrative law, tort law, or seeking prevention through education or informal modes of social control.[229] For example, in order to discourage people from starting or continuing to smoke, a preventive interpretation of the ultima ratio would advocate only a limited prohibition of smoking in certain public areas, and the use of non-penal techniques like taxation and bans on advertising.

However, this preventive interpretation of the ultima ratio principle becomes problematic in light of other core functions of criminal law. There is a broad consensus that criminal law also has retributive and expressive (censuring) functions, in addition to utilitarian, preventive functions. For some scholars the achievement of retributive justice is in fact the sole purpose of criminal law.[230] So if one argues that criminalisation is intended not only to prevent, but also to censure or condemn certain kinds of behaviour, the ultima ratio principle to a large extent loses its critical limiting function. Even when non-penal alternatives may be more successful in terms of harm prevention and crime reduction, they will probably fail to achieve the retributive and censuring functions of criminal law.[231] Consider the following example. Suppose that empirical studies were to demonstrate that non-penal techniques like education, awareness programmes and social control would do a better job of preventing sexual violence than punishing it would. This would, however, not be a sufficient argument against criminalisation of rape and sexual assault because the purpose of these crimes is not only deterrence and prevention, but also retribution and condemning those who engage in these kinds of behaviour. Without the expressive function of criminal law it would probably be very difficult to denounce sexual violence as a public wrong. This also means that an alternative *censuring interpretation* of the ultima ratio principle seems rather futile as it is hard to imagine that there are other (legal) mechanisms (lynching is obviously excluded) that would do a better job of expressing formal condemnation than criminal law.[232] Arguably, the ultima ratio principle is mostly relevant in helping to decide on the (de)criminalisation of types of conduct that do not require retribution and formal censuring, and where prevention is almost the sole objective, as is the case with a lot of regulatory offences.[233]

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[226] D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), p. 217.

[227] See on criminalisation in the name of harm prevention also: section 5.2 of this chapter.

[228] D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), pp. 217–219.

[229] A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, 'A. P. Simester and Sullivan's Criminal Law: Theory and Doctrine' (A&C Black 2016), pp. 675–677.

[230] See for example: M. Moore, 'Placing Blame: A Theory of Criminal Law' (Clarendon Press 1997), p. 28. See also on retributivism: Chapter I.

In conclusion, we would like to emphasise that in many criminalisation debates the policy question is not so much whether we ought to choose between penal or non-penal means. More relevant is how these techniques can work together in order to achieve the legislative objective. In reality, the ultima ratio principle is therefore not often employed to replace criminal law by non-penal alternatives, but more to establish a balanced policy strategy wherein both mechanisms contribute to an efficient protection of legal values and interests. Consider for instance the enforcement of environment law. In recent scholarship it is argued that for an optimal protection of the environment, and given the high costs of criminal procedure, criminal law should only be used as the last resort. Criminal law ought to be reserved for the more serious cases of environmental pollution, also because only the latter really require the censuring message of criminal law.[234] Sanctioning through administrative law

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[231] Criminal law may even be the only resort available to achieve this purpose. See for a more detailed discussion: D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), pp. 217–227; D. Husak, 'Applying *Ultima Ratio*: A Skeptical Assessment' Ohio State Journal of Criminal Law (2005), pp. 536–540.

[232] D. Husak, 'The Criminal Law as Last Resort' Oxford Journal of Legal Studies (2004), p. 223. One could probably argue that in some cases restorative justice practices may do as good a job in satisfying the expressing function of criminal law than mere punishment. This may be true, but restorative justice is usually considered to be an alternative to punishment when a crime is already committed, and not as an alternative to criminalisation itself. See also on restorative justice: Chapter I.

[233] What Husak calls non-stigmatising offences: D. Husak, 'Applying *Ultima Ratio*: A Skeptical Assessment' Ohio State Journal of Criminal Law (2005), p. 539.

[234] See: M.G. Faure, 'The Revolution in Environmental Criminal Law in Europe' Virginia Environmental Law Journal (2017), pp. 321-356; S.F. Mandiberg and M.G. Faure, 'A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication

(suspension or revocation of licences, fining) ought to be applied first. Instead of employing only the criminal law system, allowing enviromental agencies to impose administrative sanctions might be more effective in reducing environmental harm and at a lower cost.[235] This is a good example of how the ultima ratio principle helps us to decide how to use both penal and non-penal means in order to attain a legislative objective.

11. CONCLUDING REMARKS

The foregoing discussion has shown that constructing limits to criminal law, or boundaries for criminalisation respectively, is a rather complex matter. We have seen that criminalisation is more than just a question of legal theory. A wide variety of factors, such as social developments and shifts in criminal policy, as well as legal moral and philosophical factors (like individual autonomy and social welfare), may all come to play a role in penal legislation debates. In other words, a change in the values and aspirations underlying criminal law also has an impact on criminalisation in practice. We have for instance seen that the transformation of modern societies into risk societies and cultures of controls has significantly influenced the interests that criminal law nowadays seeks to protect, as well as the way and means utilised by criminal justice systems to protect its citizens.

We have discussed a variety of principles and values that in one way or another allow us to critically think about and reflect on whether or not certain behaviour should be criminalised. We have seen that principles like individual autonomy, the protection of human rights and ultima ratio may exert some restraint on lawmakers. In practice and in day-to-day politics, however, sometimes only lip service is paid to these principles rather than careful consideration.

In the common law tradition, the harm principle has traditionally played a crucial role in criminalisation. We have however seen that this principle is not in and of itself always able to provide clear limits for criminal law. While it certainly provides a good (first) yardstick, it is plagued by too many theoretical and conceptual uncertainties to conclusively decide that certain behaviour should (not) be criminalised. There is always a danger of the harm

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of Administrative Authority in the United States and Europe' Columbia Journal of Environmental Law (2009), pp. 448–511; M.G. Faure and K. Skatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' Journal of Environmental Law (2012), pp. 253–286.

[235] M.G. Faure and K. Skatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' Journal of Environmental Law (2012), p. 260.

principle becoming too ambiguous or too broadly defined and of it thereby losing its critical function. For some authors this risk is even an argument to replace a harm-centred approach with a rights-centred approach, justifying criminalisation primarily on the basis of the violation of others' rights, such as property and bodily integrity, rather than on the presence of (risk of) harm. In any case, the harm principle can only be respected if harm has a strict meaning that is different from merely being offensive or immoral, and the burden of proof of harm lies arguably with those who want the given conduct to be criminalised.

Although notions of individualised harm and (moral or legal) wrongfulness are able to justify the more traditional types of crime, such as theft and rape, this is evidently not the case for most regulatory offences that are created to protect public interests like health, safety and the environment. These kinds of offences are used to deter people from (potentially) dangerous behaviour rather than to censure certain conduct. To justify regulatory offences it is therefore more difficult to appeal to wrongfulness, unless one were to assume that this is already present in the mere violation of the norm itself.

The German doctrine of legal goods (*Rechtsgütertheorie*) arguably does not do much better in providing clear limits for legislators. While it manages to steer clear of some of the pitfalls of the harm principle by focusing on underlying legal interests worthy of protection by criminal norms, rather than harm, it fails to clearly delineate which interests warrant protection and which do not.

In addition, tensions between individual autonomy and social welfare interests are visible, especially with regard to the protection of collective legal interests (such as the environment), and the doctrine struggles with certain immoral behaviour. Some have therefore argued that the theory of legal goods should be made more concrete by combining it with the harm and the offence principle. This may put more flesh on the bones of the doctrine by providing additional indications as to which interests warrant protection and which not. Conversely, the harm principle's normative bite may arguably be increased by incorporating a legal interest perspective. On this view, not just any (potential) harm to others may warrant the criminalisation of behaviour, but only (wrongful) harm to significant legal interests may do so. Delineating concrete interests that criminal law may seek to protect would arguably make the application of the harm principle more concrete and help to avert some of the inflationary tendencies for which the harm principle is criticised.

In any case, the foregoing discussion has arguably shown that no master principle exists in legal theory that limits the scope of criminal law and provides us with a general, abstract description as to what conduct may be legitimately criminalised. The most appropriate justification for the state's power to criminalise arguably consists of a blending of principles, meaning, for example, that neither harm or wrongfulness are on their own sufficient grounds for criminalisation. Also, the aforementioned principles will take different forms and be given different weight depending on the concrete deviant behaviour under discussion.

What is also very relevant is that different kinds of crimes may require different justifications. Simply put, other principles will most likely be relevant and carry the day in a debate over the criminalisation of environmental crime than in relation to prostitution or terrorism. We have seen that the concrete content and implementation of principles of criminalisation is also co-determined by the prevalent social environment, values and preferences within a criminal justice system. These factors may thus in turn determine how much weight a system gives for instance to social welfare interests, individual autonomy, privacy rights, harm (prevention), etc.

Principles of criminalisation will arguably not provide us with easy, generally applicable solutions to the conundrums of criminalisation. Rather, they help scholars and legislators to put different aspects of a criminalisation debate on the agenda for an open discussion. They may provide guidelines for legislators and through an open democratic discussion lead to the balancing of at times competing interests that speak against or in favour of the criminalisation of certain unwanted behaviour.

CHAPTER III
THE PRINCIPLE OF LEGALITY

Christina Peristeridou

1. INTRODUCTION

The principle of legality is one of the cornerstone principles of criminal law and it is usually one of the first topics discussed in handbooks analysing concepts of criminal liability. This is because before we start discussing whether Markus was a perpetrator or simply a participant to the theft, or whether Kate was responsible for murdering her brother even though she was drunk, one has to check whether the behaviour is prohibited by criminal law. The principle of legality deals precisely with the question of whether or not and under which preconditions behaviour is prohibited. Although many acts can be harmful, immoral, or socially reprehensible, not all of them are prohibited by criminal law. The principle of legality requires that an act can be prohibited by criminal law only when there is a provision that punishes this behaviour. Frequently, this principle is quoted with the maxim '*nullum crimen nulla poena sine lege*' or, 'there is no crime without law'. It is neither the judge, nor the prosecutor, nor any code of ethics, but only the *law* that can attach criminal character to behaviour. This principle is based on the thesis that the immorality or harmfulness of an action are not enough to justify a state response in the form of criminal prosecution.

In this chapter we shall delve deeper into the concept of the legality principle starting with how this principle is concretised. What makes a norm a 'criminal *law*'? Furthermore, we will address the question of why this concept is important and on which rationales it is based. In addition, this principle shall be approached in a comparative manner by examining how it is applied within the different legal systems. Finally, the current challenges of the legality principle shall be presented by looking at two judgments where the legality principle is applied. Due to the rapidly changing society and the challenges that this creates in criminal law, the principle of legality has not been applied as it was originally conceived. Some of its requirements cannot be applied strictly, whilst there are frequently 'hard cases' where the interpretation of the scope of criminal liability is rather challenging.

2. THE FOUR ASPECTS OF THE LEGALITY PRINCIPLE

The principle of legality generates four aspects, as envisaged by Feuerbach.[1] Those aspects are the expressions of the same principle, as this is applied to the creation, application and interpretation of criminal liability. This principle applies to both the criminal liability and the punishment, thus prohibiting not only the criminalisation but also the imposition of a criminal sanction without a criminal norm. It requires that criminal liability and punishment be based on a pre-existing, written, precise parliamentary criminal norm, which should not be applied extensively by courts.

2.1. *LEX SCRIPTA*

The first aspect is addressed to the courts and it obliges judges to base criminal liability only on written statutes as opposed to customary laws; this is often referred to as *lex scripta*. Customary, religious or moral rules of a community must not form the basis for criminal liability.[2] This aspect prescribes that criminal liability should be written. It also requires that it should be based only on a parliamentary criminal statute. The latter requirement is sometimes referred to as *lex parliamentaria*.[3] The executive and the courts are not allowed to prescribe criminal liability norms. On some occasions, certain executive bodies may be able to prescribe criminal norms, albeit only when there is a proper delegation of such powers issued by the parliament and under strict limitations prescribed by constitutional rules.[4] The legality principle therefore gives a very particular definition as to what constitutes a criminal *law*: a criminal *law* can be only a written parliamentary statute, whereas case law or unwritten customary rules are excluded from the concept of *law*. An example can be seen in European law. Although the European legislative bodies have competence to prescribe criminal liability in a Directive in accordance with the European treaties, in order for those criminal norms to be applied within the internal national order, the national parliament must implement them with a national parliamentary statute. In absence of such implementation, national authorities would violate the legality principle if they were to base criminal liability solely on European Directives.[5]

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[1] P.J.A. Feuerbach, 'Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts' (1801); for a history of the principle see: V. Krey, 'Keine Strafe ohne Gesetz' (Walter de Gruyter 1983).

[2] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 86.

[3] B. Schünemann, 'Nulla poena sine lege? Rechtstheoretische und verfassungsrechtliche Implikationen der Rechtsgewinnung im Strafrecht' (Walter de Gruyter 1978), p. 3.

[4] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2009), p. 83.

2.2. *LEX CERTA*

The second aspect of the legality principle, known as *lex certa*, is addressed to the legislator and it requires that criminal liability be described in a precise manner so that citizens can understand from the wording of the norm what is prohibited. Vague criminal norms violate the principle of legality, as individuals should be able to distinguish with certainty prohibited by not prohibited acts.[6] There are different methods to describe criminal liability in a statute.[7] Frequently, the use of general clauses such as 'public morals' can be rather problematic.[8] Thus, on occasion, courts may declare a vague criminal norm as being in violation of the legality principle.[9] Furthermore, this aspect obliges the legislator to define criminal liability in comprehensible language, namely in the official language of the legal system. This means that when the origin of criminal liability can be found in international instruments, it must be translated during implementation in order to be in line with the lex certa.[10] Finally, the principle of legality demands that the legislator make its criminal legislation accessible to the public via publication.

2.3. *LEX STRICTA*

The third aspect of the legality principle is addressed to courts and it prohibits the extensive judicial interpretation of criminal liability. This aspect is also known as *lex stricta*. Judicial interpretation should always remain faithful to the wording of the criminal statute, as the latter depicts the limits of the scope of criminal liability.[11] There are different methods of interpretation that exist in the toolbox of courts; for example, there is the grammatical interpretation, the historical interpretation and the teleological interpretation where courts search for the *telos* – the will – of the legislator.[12] Particular problems emerge with analogical interpretation, where the judge brings acts within the scope of criminal liability by using analogical reasoning. Analogical interpretation is prohibited by the legality principle; however, it is not always easy to determine what analogy is and how to demarcate analogy from other interpretations. For example, the German court was faced with the question of whether or not the term 'weapon' in Article 113 para 2.1 GCC (resisting enforcement officers by means of a weapon) could also encompass a vehicle (a car) that was used to injure an officer. The court held that such an interpretation of the term 'weapon' would constitute an interpretation by analogy, which is prohibited by the legality principle, as the term 'weapon' in its casual meaning includes only objects whose primary purpose is to be used as weapons (such as knifes, pistols etc.).[13]

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[5] ECJ C-80/86, Kolpinghuis Nijmegen [1987] ECR 3969.

[6] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 94–95.

[7] W. Hassemer, 'Einführung in die Grundlagen des Strafrechts' (Verlag C.H. Beck 1990), p. 258.

[8] B. Schünemann, 'Nulla poena sine lege? Rechtstheoretische und verfassungsrechtliche Implikationen der Rechtsgewinnung im Strafrecht' (Walter de Gruyter 1978), p. 30.

[9] 22 June 1989 BVerfG NJW 1989, 1663.

[10] HR 24 June 1997 NJ 1998, 70 m.nt 't Hart.

[11] 10 January 1995 BVerfG NJW 1995 1141.

In contrast, when it comes to technological developments, there are various examples in case law where courts have adjusted existing legislation. A case worth mentioning in any analysis involving the Dutch system is the electricity case, where the Dutch court interpreted the term 'good' (*'enig goed'*) in Article 310 DCC on theft, as also encompassing electricity.[14] The court used argumentation that is quite similar to analogy. According to the court, 'goods' are those with autonomous existence, availability, capability to move and economic value. Since electricity can be accumulated, it falls within the scope of this term.[15] Such interpretation, according to the court, is also consistent with the modernisation of life, as goods cannot be only material objects. Somewhat similar cases have been also interpreted accordingly, such as cases involving computer data[16] and most interestingly the concept of theft in the virtual world of computer games.[17]

2.4. *LEX PRAEVIA*

The final aspect of the legality principle deals with the concept of time and it prohibits both the legislator and the judge to draft and apply – respectively – criminal liability in a retroactive manner. This aspect is also known as *lex praevia*. It should be noted that this is the aspect of the legality principle that is usually codified in criminal codes and constitutions; for example the legality principle in §1 GCC reads: 'An act may only be punished if criminal liability had been established by law before the act was committed'. This is because retroactive criminalisation is particularly detrimental for individuals, as it brings about an unfair surprise. The other aspects of the legality principle can be easily interpreted from this codification, as any vague, extensively interpreted or unwritten criminal liability can be considered as retroactive.[18]

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[12] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 102–105.

[13] 1 September 2008 BVerfG NStZ 2009, 83.

[14] HR 23 May 1921 NJ 1921, 564.

[15] M.S. Groenhuijsen and F.P.E. Wiemans, 'Van electriciteit naar computercriminaliteit' (Gouda Quint 1989), p. 84; B.M.J. van Klink and L.M.M. Royakkers, 'Analogie en Rechtszekerheid in het strafrecht' Delikt en Delinkwent (1999), pp. 977–997.

[16] See for a comparison between cases: M.S. Groenhuijsen and F.P.E. Wiemans, 'Van electriciteit naar computercriminaliteit' (Gouda Quint 1989), p. 84.

[17] Rb. Leeuwarden 21-10-2008, LJN BG0939.

What is retroactivity? Retroactive criminalisation can occur if the legislator gives a statute an enactment date that is in the past or if the judge applies a statute that was published after the behaviour took place. Therefore, the legislator must never attach a retroactive effect to statutes that define criminal liability, and courts should make sure that the legislation that they apply predated the behaviour. This can be especially problematic when there are various amendments to legislation. An important exception to the *lex praevia* is when the amendment of criminal liability is for the benefit of the accused (behaviour is decriminalised, or the scope of criminal liability is limited). In that situation, the prohibition of retroactivity does not apply and, on the contrary, courts must apply the more lenient legislation retroactively as this benefits the accused. The obligation to retroactively apply a more lenient amendment of criminal liability is also known as *lex mitior*.[19]

3. THE RATIONALE OF THE PRINCIPLE OF LEGALITY

The principle of legality is embedded in all European legal systems. It has been codified in many national codes, constitutions and international instruments, such as Article 7 of the European Convention of Human Rights (ECHR) and Article 49 of the Charter of Fundamental Rights of the European Union. Why is this principle so important?

3.1. HISTORICAL ROOTS

It is not hard to imagine a criminal system without this principle. The parliament would be able to draft criminal liability with retroactive effect and using general clauses, creating norms that no one could understand, which would capture behaviours already committed. However, these norms would be of no significance as courts would be able to criminalise any act they see fit without abiding by any legislation, while the prosecutor would be able to initiate proceedings against anyone she is not fond of, for whatever reason she finds. The individual would not be able to know in advance which acts are prohibited. Citizens would be subjected to the power of the state without any conditions, they would be deprived of the right to determine their lives and they would lose trust in the actions of the state and eventually in their own actions. Such a criminal system would be unfair and cruel as it would not position the individual as the 'centre of agency' but as a toy in the hands of the powerful few.[20] Hence, the principle of legality ensures that the criminal system is armed with protective guarantees against uncertainty and state arbitrariness.[21]

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[18] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 87–88.

[19] ECtHR, Scoppola v Italy, 10 June 2008, Appl. No. 50550/06. For an interesting application of the *lex mitior* in the Netherlands see: HR 9 November 1942 NJ 1943, 10; HR 15 January 1952 NJ 1952, 242; G. Knigge, 'Verandering van Wetgeving' (Gouda Quint 1984), pp. 459–463.

The roots of the principle of legality are found in certain important theoretical rationales that underpin our criminal and constitutional law systems, such as individual autonomy and liberty, democracy, separation of powers and the Rule of Law. Historically, these values have been prevalent in Western culture since ancient times – for example in the writings of Plato, Socrates and Aristotle[22] – and they were also depicted in the axioms of Western religions.[23] However, it was during and after the Enlightenment movement that they were embedded in our criminal law systems. Under the influence of Enlightenment thinkers such as Montesquieu, Beccaria and Rousseau, the legitimacy of the oppressive powers of the *Ancien Régime* has been put into question. What was put forward from the collective work of the Enlightenment thinkers was a new legitimation theory for criminal law, according to which the oppressive powers of the state have a dual legitimation: a legitimate criminal law should ensure a peaceful society and also protect the individual/potential perpetrator from state arbitrariness.[24]

3.2. INDIVIDUAL LIBERTY, AUTONOMY AND HUMAN DIGNITY

The legality principle mirrors a respect towards individual liberty, autonomy and human dignity. According to these concepts, human beings are approached as subjects of the law, unique individuals, endowed with reason and 'born free'.[25] As the individual sphere of liberty is restricted by the formation of societies and the prohibitions of criminal law, it should be limited as little as possible: 'Thus it was necessity that forced men to give up a part of their liberty. It is certain then, that every individual would choose to put into the public stock the smallest portion possible [...] The aggregate of these, the smallest portions possible, forms the right of punishing; all that extends beyond this, is abuse, not justice.'[26] Having this element as a starting point, it becomes necessary to limit the powers of the state. The concept of individual autonomy entails that individuals make conscious and rational choices and have the right of self-determination.[27] A law based on individual autonomy is a law that fosters human dignity.[28] Individual autonomy enriched with the concept of human dignity is translated as 'the capacity of every person to act under minimal conditions of confidence, which comes down to the capacity of every person to discover in the rules of law a minimal regulatory force with regard to her own conduct and those of others.'[29] Thus, a legitimate criminal law must safeguard a climate of legal certainty.

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[20] E. Claes, 'Criminal justice, legality and human dignity' in E. Claes, R. Foqué and T. Peters (eds.), Punishment, restorative justice and the morality of law (Intersentia 2005), p. 41.

[21] A.A.G. Peters, 'Het rechtskarakter van het strafrecht' (Kluwer 1972), p. 9; G. Grünwald, 'Bedeutung und Begründung des Satzes nulla poena sine lege' ZStW (1964), pp. 13–14.

[22] R. Foqué, 'Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment' Criminal Law and Philosophy (2008), pp. 207–227.

[23] A. Supiot, 'Homo Juridicus: on the Anthropological Function of the Law' (Verso 2007), pp. 10–28.

[24] S. Gutwirth, 'Waarheidsaanspraken in recht en wetenschap' (Maklu 1993), pp. 337–348.

3.3. RULE OF LAW

The principle of legality is also based on the concepts of the Rule of Law, democracy and separation of powers. Roughly speaking, the Rule of Law means that a polity should be governed by 'law' as opposed to arbitrary decisions of state authorities; however, there are various interpretations of this concept.[30] In essence, the Rule of Law advocates for the subordination of the state-powers to legal norms. Some interpretations of the Rule of Law approach this concept from a formal perspective, according to which a system governed by the Rule of Law must be regulated by norms that are clear and non-retroactive.[31] Other interpretations advocate for additional substantive requirements, such as the protection of certain basic individual or human rights.[32] If infused with a liberal ideology, the Rule of Law entails that the state should not impose any particular versions of the 'good life' to individuals. This neutrality of the state can be seen as 'the priority of justice over the good, and hence the fact that questions of the good life recede behind questions of justice.'[33] A democratic Rule of Law is a polity governed by the laws produced by democratic procedures. The principle of democracy is an expression of political autonomy, citizenship and equality; in a democracy, individuals are able to participate equally in the formation of the 'general will' (*la volonté générale*) and their participation to the decision-making is an exercise of their right to-self determination.[34] A democratic system allows the masses an adequate degree of self-governance or self-legislation, according to which 'the addresses of law are simultaneously the authors of their rights'.[35] Therefore, criminal laws produced by democratic procedures find their legitimation in that they are products of the general will, which individuals, as potential victims and perpetrators, have agreed upon. The limitation of their freedom and the determination of the boundaries of their individual autonomy is a product of their will.

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[25] J.-J. Rousseau, 'The Social Contract: or Principles of Political Right' (1762), Book 1, Ch. 1 (republished by Wordsworth Editions, 1998); A. Supiot, 'Homo Juridicus: on the Anthropological Function of the Law' (Verso 2007), pp. 10–11.

[26] C. Beccaria, 'An essay on Crimes and Punishments' (1764), Chapter 2, Of the right to punish (republished by Branden Press Inc 1983).

[27] R. Dworkin, 'Taking rights seriously' (Duckworth 1977), p. 263.

[28] J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', in J. Habermas, The crisis of the European Union: a Response (Polity 2012), p. 81.

[29] E. Claes, 'Criminal justice, legality and human dignity', in E. Claes, R. Foqué and T. Peters (eds.), Punishment, restorative justice and the morality of law (Intersentia 2005), p. 41.

[30] B.Z. Tamanaha, 'On the Rule of Law: History, Politics, Theory' (Cambridge University Press 2004), p. 92.

[31] F.A. Hayek, 'The road to serfdom' (Routledge and Kegan Paul 1976), p. 54 (originally published in 1944).

[32] R. Dworkin, 'A Matter of Principle' (Harvard University Press 1985), pp. 11–18.

3.4. SEPARATION OF POWERS

A democratic Rule of Law presupposes the necessity to safeguard the democratic legitimation of criminal liability and thus to separate the role of the parliament from the role of judge and the government. The doctrine of the separation of powers, advocated by Montesquieu in *De l'esprit des lois* (*The Spirit of the Laws*) in 1748, structures and balances the trias politica.[36] Its purpose is to decentralise the power of the state, canalise its spontaneity and distribute it amongst the state actors taking into account the democratic principle and the protection from state arbitrariness. This concept has also received various interpretations, which are influenced by the perspective one takes of the Rule of Law. A strict interpretation of the separation of powers holds that courts should merely apply criminal norms so that individuals are safeguarded from arbitrary judicial decisions that define the scope of criminal liability without a democratic legitimation.[37] Frequently in literature, this interpretation is based on the words of Montesquieu that courts are 'only the mouth that pronounces the law' ('*les juges de la nation ne sont que la bouche qui prononce les paroles de la loi*'); however, contemporary historical research suggests that the actual meaning of this famous phrase has been misinterpreted.[38] A modern re-interpretation of Montesquieu's separation of powers suggests that the trias politica should function based on a system of 'checks and balances';[39] according to the latter, none of the powers should gain absolute control, but every power should check the other (*le pouvoir arrête le pouvoir*).[40] Following this interpretation, although courts must not create or expand criminal liability, they obtain a more dynamic role in interpreting statutes; they may also retain the power of a marginal control over the requirement of precision and clarity of legislation, or its compatibility with constitutional rules in systems that allow constitutional review (for example the German system).

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[33] J. Habermas, 'Between Facts and Norms' (Polity 1997), p. 309.

[34] R.A. Dahl, 'Democracy and its critics' (Yale University Press 1989), p. 108.

[35] J. Habermas, 'Between Facts and Norms' (Polity 1997), p. 104.

[36] R. Foqué and A.C. 't Hart, 'Instrumentaliteit en Rechtsbescherming' (Gouda Quint/Kluwer 1990), pp. 67–83.

[37] G. Grünwald, 'Bedeutung und Begründung des Satzes nulla poena sine lege' ZStW (1964), pp. 13–14.

4. THE LEGALITY PRINCIPLE IN THE NATIONAL SYSTEMS

4.1. A COMPARATIVE VIEW OF THE LEGALITY PRINCIPLE

The nature and application of the legality principle is substantially different in civil and common law legal traditions. The main difference is that while in civil law systems criminal law is statutory (the law is made by the parliament), in common law systems it is traditionally found in case law (the law is discovered by courts). Although nowadays criminal liability in England is also statutory and English courts have no powers to create new offences, the diametrically opposite starting point of the two traditions has played a significant role for the legality principle.

4.1.1. The traditional difference

The Rule of Law has had similar interpretation in both the civil and common law traditions, namely the protection of individual vis-à-vis the state. However, historically, the methods in applying these concepts differed. The civil law traditions have been influenced by the codification movements that affected the European continent after the French Revolution.[41] The aim of the codification movement was to limit the powers of judges, which were seen as the main culprits of arbitrariness. The outcome was a rather structured and hierarchical legal system, where parliamentary statutes enjoy superiority as sources of law to which judicial judgments are subordinate.[42] This meant that a legal mechanism, such as the legality principle, should be established to safeguard this. It would be fair to say that the legality principle, as applied in its different aspects, is therefore indigenous to the continental systems.

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[38] K.M. Schönfeld, 'Rex, Lex et Judex: Montesquieu and la bouche de la loi revisited' European Constitutional Law Review (2008), pp. 274–301.

[39] W.J. Witteveen, 'Evenwicht van machten' (W.E.J. Tjeenk Willink 1991), pp. 34–35.

[40] Montesquieu, 'De l'esprit des lois' (1748), Book XI, Chapter IV; W.J. Witteveen, 'Evenwicht van machten' (W.E.J. Tjeenk Willink 1991), p. 70.

[41] A.C. 't Hart, 'Recht als schild van Perseus' (Gouda Quint 1991), p. 39.

Common law traditions took a different view in the application of the Rule of Law, according to which the protection of individuals from illegitimate state action was safeguarded in a more customary manner: there was a widespread belief and commitment amongst legal practice, the state and the community that England was ruled under the Rule of Law and it was only this attitude that ensured that the Rule of Law was applied.[43] This is also mirrored in the lack of any written constitution in England, as well as in the absence of parliamentary criminal statutes, which did not appear until much later.[44] Separation of powers and the principle of democracy were also interpreted differently, as courts were not approached with antipathy and suspicion but were rather considered for a long time as protectors against the sovereign law-makers.[45] The existence of a mechanism that would safeguard the superiority of parliamentary statute was not necessary. Therefore, historically, the legality principle was an alien concept in traditional common law. In fact, criminal liability in England had been created and developed by courts via case law.[46] However, the absence of a legality principle in English law does not necessarily mean that there had been no protection against arbitrariness. The widespread view had been that judges would reflect in their judgments certain unwritten aspirational and unaltered values that reflected the societal culture.[47] What is more, the common law system was – and is – governed by rules on precedent and stare decisis, which, roughly speaking, means that courts are bound by existing authority in previous case law.[48] The latter could function as a barrier to retroactivity and uncertainty.

4.1.2. A convergence of traditions?

Nowadays, the situation for both the continental and common law traditions is quite different. From the end of the 19th century, English common law has been undergoing an incremental change where parliament has taken up the task of prescribing criminal law in statutes, a development that peaked at the end of the 20th century with the codification movement.[49] While there is currently no English criminal code, the English legislator has already created statutes covering almost all the previous common law offences. Concomitantly, English courts have gradually renounced their powers to create or expand criminal offences, although it has been a bumpy ride. In the early 19th century, the powers of English courts were already seen with suspicion, especially with regard to retroactive criminalisation and legal certainty: 'When a man has a dog to teach, he falls upon him and beats him: the animal takes note in his own mind of the circumstances in which he has been beaten, and the intimation thus received becomes, in the mind of the dog, a rule of common law. [...] Men are treated like dogs, they are beaten without respite, and without mercy; and out of one man's beating, another man is left to derive instruction as he can.'[50] During the 20th century, English courts have generally refrained from creating or expanding criminal liability and in some cases they have explicitly renounced their powers to do so,[51] albeit with some notable exceptions, such as the marital rape case that we will see below.[52] In the same time, some common law principles, such as the presumption against retroactivity, have received more status and attention.[53]

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[42] P. Beauvais, 'Le principe de la légalité pénale dans le droit de l'Union européenne' (Université Paris X Nanterre UFR Thèse 1 décembre 2006), p. 73.

[43] B.Z. Tamanaha, 'On the Rule of Law: History, Politics, Theory' (Cambridge University Press 2004), p. 58.

[44] J. Spencer, 'Nulla poena sine lege in English Criminal Law' in The Cambridge-Tilburg Law Lectures, Third Series (Kluwer 1980), p. 36.

[45] See more generally: C.H. McIlwain, 'The English Common Law, Barrier against absolutism' American Historical Review (1943).

[46] The judge-made law was based on the declaratory theory, see for more: B. Juratowitch, 'Retroactivity and the common law' (Hart Publishing 2008), pp. 119–121.

[47] B.Z. Tamanaha, 'On the Rule of Law: History, Politics, Theory' (Cambridge University Press 2004), p. 57.

[48] B. Juratowitch, 'Retroactivity and the common law' (Hart Publishing 2008), pp. 125–126.

For continental systems, on the other hand, the legality principle has been of great importance and an inherent part of their legal cultures. The concept of the principle of legality has been understood as multi-faceted, as explained above, and generally applied as such. However, continental systems have also undergone a gradual transformation. The horrors of the Third Reich have had a lasting impact on the concept of Rule of Law and parliamentary democracy. In particular, the concept of the Rule of Law – conceived as the subordination of the authorities to the legal rules of parliament – was in the aftermath of the Third Reich considered inadequate: the participation of the judges in the totalitarian regime by following the wording of criminal norms irrespective of the fact that these violated human dignity was particularly criticised.[54] In addition, the legislator has often been unable to catch up with the modernisation of society and the rapid technological advancements. The separation of powers has therefore been interpreted in a looser manner. Most notably, the application of the lex certa and lex stricta aspects of the legality principle has been relativised.

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[49] The codification was taken up by the Law Commission and it was abandoned but again revived in 2009. The project is still in progress, see: http://lawcommission.justice.gov.uk/areas/codification-of-the-general-principles-of-the-criminal-law.htm (accessed 01.11.2014); G. de Búrca and S. Gardner, 'The Codification of the Criminal Law' Oxford Journal of Legal Studies (1990), pp. 559–571.

[50] J. Bentham, 'Rationale of Judicial Evidence' (Hunt and Clarke 1827), p. 475.

[51] Queen v Price [1884] 12 QBD 247; DPP v Bhagwan [1972] AC 60; Knuller v DPP [1973] AC 435; DPP v Withers [1975] AC 842; R v Rimmington and R v Goldstein (joined cases) [2005] UKHL 63; Norris v Government of the United States of America [2008] UKHL 16.

[52] Another exception is the rather infamous Shaw v DPP [1962] AC 220.

[53] B. Juratowitch, 'Retroactivity and the common law' (Hart Publishing 2008), pp. 67–118.

[54] G. Radbruch, 'Statutory Lawlessness and *Supra*-Statutory Law (1946)' (translated into English by B. Litschewski-Paulson and S.L. Paulson) Oxford Journal of Legal Studies (2006), pp. 5 and 8.

4.1.3. *Application of* lex certa

To illustrate this, let us take a look more specifically at the requirement of lex certa. The requirement of precision in the statutes has been very difficult to apply, as language is inherently indeterminate. How precise should the wording be? What makes a norm precise? The legislator on the one hand must ensure that the wording of the text is general enough as to describe a pattern of behaviour whereas on the other hand, such pattern must provide sufficient guidance to individuals. Absolute certainty cannot be safeguarded. An example is the Dutch statutory liability on rape, where sexual acts are defined as 'sexual penetration of the body' (Article 242 DCC: '*seksueel binnendringen van het lichaam*'). Understandably, the Dutch legislator wished to include various types of sexual penetration, which may encompass penetration of bodily or non-bodily parts into the victim's body; given the variety of sexual acts, a more specific listing of behaviours would be rather inefficient. Although the wording does not seem dangerously vague at first sight, it has allowed for some leeway in judicial interpretation. For example, the Dutch court has interpreted this term as also including a forced 'French kiss', as, grammatically speaking, this is a penetration of the body.[55] Later on, however, this interpretation was reversed in a more recent judgment, as according to the court, a 'French kiss' cannot be put on the same level as sexual intercourse.[56]

In German theory, there have been many attempts to pin down a threshold for precision.[57] German courts have also provided some general rules; however, these are relative themselves or rely heavily on judicial interpretation, e.g. the more severe the offence, the higher the level of precision,[58] or a norm violates the lex certa if, after exhausting all interpretation techniques, the courts fail to clarify its context.[59] Generally speaking courts will make an effort to concretise abstract norms themselves and therefore abstract legislation is rarely declared as being in violation of the lex certa. To this extent, jurisprudence may also obtain a communicative value for individuals, as it may contain interpretations of provisions that concretise the scope of criminal liability.[60] However, one should not conclude from this that jurisprudence, in continental systems, has received the status of an official source of criminal liability. The German court has held that jurisprudence does not have a similar binding nature as statutes and, therefore, a change in the interpretation of a criminal norm would not be – in principle – a violation of the legality principle; however, the court also stated that such a change in the interpretation should nevertheless satisfy minimum requirements of continuity of the law and of legitimate expectations.[61] From this analysis we notice that while statutes are, in principle, the sole source of criminal liability in continental systems, in practice judicial interpretation has a dynamic character. This development has prompted a discussion in literature about whether features of common law, such as a theory of precedent, should be also established in continental systems.[62]

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[55] HR 21 April 1998 NJ 1998, 781.

[56] HR 26 November 2013 NJ 2014, 62 m.nt. N. Keijzer; the court's reasoning for altering its view is met with criticism, see for example (and also for more judgments that deal with the interpretation of 'French kiss' as rape): K. Rozemond, 'Nogmaals de tongzoen' (Annotatie) Ars Aequi (2014), pp. 291–296.

[57] B. Schünemann, 'Nulla poena sine lege? Rechtstheoretische und verfassungsrechtliche Implikationen der Rechtsgewinnung im Strafrecht' (Walter de Gruyter 1978), pp. 35–37.

[58] 25 July 1962 BVerfG NJW 1962, 1563.

[59] 10 March 2009 BVerfG NJW 2009, 2370.

4.2. THE INFLUENCE OF THE ECtHR ON NATIONAL SYSTEMS

As mentioned, the differences between common and civil law systems have been diminished significantly. This development has also been facilitated by the influence of the European Court of Human Rights (ECtHR).

In England, the ECtHR jurisprudence had a major impact as it brought the holistic doctrine of the principle of legality (with its different aspects) into the English legal order and in addition fashioned the name 'principle of legality'.[63] By reference to the ECtHR jurisprudence, English courts now had access to a single legal doctrine that prohibited retroactivity and vagueness, but also the unforeseeable development of common law offences.[64] English courts have increasingly referred to the principle of legality in the Convention when they deal with questions of interpretation in criminal law and have reproduced the ECtHR jurisprudence in their judgments.[65]

Such influence peaked with the introduction of the Human Rights Act in 1998. The Act does not implement the ECHR but it incorporates and adapts the

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[60] For example see the cases on the legal limits of alcohol in traffic law: 23 June 1990 BVerfG NJW 1990, 3140.

[61] BVerfG, 2 BvR 1230/10 of 16 May 2011.

[62] D.H. de Jong, 'Naar een common law – conceptie van legaliteit?' Delikt en Delinkwent (1999), pp. 687–690; B.M.J. van Klink, 'Bedreigt rechtszekerheid? Een kritische-hermeneutische visie op de rol van de rechter in het materiële strafrecht' Delikt en Delinkwent (2001), pp. 688–691; K. Rozemond, 'De casuïstische grenzen van het materiële strafrecht' Delikt en Delinkwent (2007) p. 465.

[63] See for more: A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 56–71.

[64] ECtHR X Ltd Y v UK, 7 May 1982, Appl. No. 8710/79 (Decision on admissibility).

[65] R v Rimmington and R v. Goldstein (joined cases) [2005] UKHL 63.

Convention rights into the English legal order, including Article 7 ECHR – the legality principle.[66] Despite the criticism that the Act has received,[67] it brought further changes that are relevant for the legality principle. For example sections 3 and 4 of the Act give the power to English courts to declare that legislation contradicts those rights (including the legality principle), although this declaration has no effect on the validity of those laws.[68]

Furthermore, the ECtHR, functioning without an affiliation to a particular legal tradition, developed an interpretation of the principle of legality detached from the particular historical idiosyncrasies that characterise common and continental legal cultures. Thus, it interpreted the legality principle without connecting it to the source of criminal liability. The ECtHR has accepted that both case law and statutes may be the basis for criminal liability.[69] Certainly, this does not oblige continental traditions to accept that courts may create criminal liability rules; in any case, as aforementioned, this would not be the case nowadays even in the English system. However, this approach to the legality principle allowed the ECtHR to shift the focus of this principle from the sources of criminal liability to the qualitative requirement of foreseeability.

According to its consistent jurisprudence, Article 7 ECHR obliges state authorities to construct and interpret criminal liability in a foreseeable manner:

> 'Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[70]

The ECtHR's interpretation of the legality principle has also had an impact on the continental systems, as it offered guidance for compensating and counterbalancing the problematic application of the aspects of the legality principle. For example German and Dutch courts have often drawn inspiration from the ECtHR jurisprudence and followed its view on foreseeability, as will be demonstrated below.[71]

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[66] C. Gearty, 'Principles of Human Rights Adjudication' (Oxford University Press 2004), pp. 9–13.

[67] C. Gearty, 'Principles of Human Rights Adjudication' (Oxford University Press 2004), pp. 1–7.

[68] C. Gearty, 'Principles of Human Rights Adjudication' (Oxford University Press 2004), p. 12.

[69] ECtHR Sunday Times v UK, 26 April 1979, Appl. No. 6538/74.

[70] ECtHR Sunday Times v UK, 26 April 1979, Appl. No. 6538/74, para 49; also similarly ECtHR Kokkinakis v Greece, 25 May 1993, Series A, no 260-A, para 52.

[71] For example, see: 10 March 2009 BVerfG NJW 2009, 2370 and HR 3 April 1985 NJ 1985, 796.

5. MODERN CHALLENGES: TWO JUDGMENTS

To some extent, the legality principle presents similar problems in both systems. To illustrate these problems, two judgments shall be presented followed by a short discussion. The judgments come from a different background. The first judgment is from the Constitutional Court of Germany and it is about the exact meaning and scope of §240 para 2 GCC, which prescribes the criminal liability of 'coercion'. The second judgment is from the European Court of Human Rights and is about the question whether the English court could convict a man for raping his wife, despite the fact that at the time of the act, the definition of rape, as interpreted by the courts at that time, gave immunity to spouses.

5.1. THE GERMAN CONSTITUTIONAL COURT AND THE DEFINITION OF COERCION

§240 para 2 GCC prescribes the criminal liability of 'coercion' (*Nötigung*) as follows:

> 'Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment of not more than three years or a fine. (2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.'

The complainants participated to a rather long sitting demonstration in front of trucks that supplied a nuclear energy plant in order to protest against the use of nuclear power. They were prosecuted and convicted for 'coercion' by means of exercising extreme psychological force on the driver of the truck. The German Constitutional Court concluded that an interpretation of the term 'force' as also encompassing psychological force would constitute a violation of the legality principle.

> **Federal Constitutional Court of Germany, 10 January 1995, BVerfGE 92, 1**
>
> 'The notion of force (*Gewalt*), which in the general use of the language is used with various meanings, has to be understood here in the context of the standard perception of the norm (*Normgefüge*). The legislator did not want to penalise in article 240 GCC every compulsion on the free volition of someone else. Otherwise other behavioural patterns – which are in social life, for instance in the educational system, the working world or the traffic area partly necessary, partly inevitable – would have come under threat of punishment. In order to avoid this, the legislator was not satisfied with describing the behaviour giving rise to criminal punishment as coercion to act, tolerate or omit, but rather to make criminal liability of such conduct

dependent on the choice of certain means of coercion namely force or threat of a considerable harm. […]

While jurisprudence has ever since upheld the physical connotation of force, it has set aside the requirement of exertion of physical power towards another person (*Kraftentfaltung*), so that now already the physical presence at one place, through which another person wants to pass or wants to take in, suffices to fulfil the actus reus element of force. In this situation liability may arise in case that the person in question is psychologically inhibited to enforce its will by the presence of the offender.

The actus reus element of "force" is thereby in a way expanded, so that it largely loses its limiting function as intended by the legislator, i.e. to demarcate punishable from necessary, unavoidable everyday oppressive behaviours on the (free) will of others. It inevitably includes numerous behavioural patterns in the criminal definition, which are seen as socially appropriate, whose criminal character is then excluded only by the corrective clause of reprehensibility in article 240 para 2 GCC.

[…] The interpretation of the term "force" in the jurisprudence of higher courts accordingly has the exact effects which article 103 para 2 of the German Constitution is meant to prevent. It is no longer foreseeable with sufficient certainty which forms of physical behaviour, which prevent others psychologically to enforce their will, shall be prohibited and which not. In situations in which force merely consists of bodily presence and the compulsion on the constrained person is merely psychological in nature, criminal liability is no longer determined previous to the deed by the legislator but by the judge in the case at hand; thus after the offence is committed and based on the judge's conviction of whether or not an act is worthy of punishment. That opens up a significant leeway for the criminal prosecution of coercion. The varying treatment of cases of blockades during demonstration in jurisprudence – on the one hand to protest against the use of nuclear power and on the other hand in cases of protests against closing down factories, increases of tuition fees, subsidy reductions or traffic planning – proves this. This was also pointed out by the fourth Criminal Chamber of the Federal Court of Justice in its statements.

The ambiguity of the broadened term "force" has also not diminished in the course of time due to a consolidated understanding of its meaning, especially when taking note that the Federal Court of Justice has in other cases such as rape defined the term "force" much more narrowly. […] As the aforementioned examples show, the criminality of sitting demonstrations under the heading of coercion remained highly uncertain. Also the continuing disagreement in case law and literature regarding the criminal nature of sitting […] show that a consolidated legal interpretation has not yet arisen.

The required precision does also not arise from the fact that due to the pertinent jurisprudence of the higher courts, at least the risk of criminal punishment is recognisable (to the public). […] The Federal Constitutional Court by referring to the argument of the recognisability of the risk of criminal punishment intended to acknowledge the fact that the legislator in criminal law is confronted with the difficult task to capture the many facets of life in general and abstract norms and is therefore only able to introduce such a degree of precision as it is permitted by the ad hoc area of regulation (*Regelungsbereich*). […] The constitutional demanded

> precision (of norms) depends in this respect on what the possibilities regarding the legal description of the conduct considered worthy of punishment are. However, this basic principle cannot justify the interpretation of an inevitably vague norm, which in turn amplifies the indeterminacy and departs even further from the objective of article 103 para 2 of the German Constitution.'

5.2. THE ECtHR AND THE DEFINITION OF RAPE

This second judgment came after the complaint of C.R., a British citizen, who was convicted of the attempted rape of his wife by the English court (the act took place on 12 November 1989), despite the fact that at the time of the act, the definition of rape gave immunity to spouses. The ECtHR found that the English court did not violate the legality principle (Article 7 ECHR).

> **European Court of Human Rights, C.R. v United Kingdom, 22 November 1995, App. No. 20190/92**
>
> '32. The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection […].
>
> 33. […] this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. […]
>
> 34. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. […]
>
> 35. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 12 November 1989, when he committed the acts which gave rise to the charge of attempted rape […] A succession of court decisions before and also after that date […] had affirmed the general principle of immunity. […] When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 […] an amendment that would have abolished the immunity was withdrawn and never voted upon. […] Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 18 above), it did not merely restate the law as it had been in 1976. […]
>
> 40. […] In this connection, the Court […] sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords

> […] that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" […].
>
> 41. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife […]. There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 34 above).
>
> 42. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords – that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.'

5.3. WHAT WE CAN LEARN FROM BOTH CASES: A COMPARATIVE ANALYSIS

Both cases bring to the foreground certain problems with the application of the legality principle. The marital rape case demonstrates the problem of adapting criminal norms to modern circumstances. The marital immunity, as recognised by prior case law and implicitly affirmed in the statutory definition of rape by the term 'unlawful', was considered anachronistic. According to the traditional interpretation of the legality principle, courts should not adapt the legislation to the changed views of society. However, the ECtHR has justified its approach with two basic arguments: (i) the English courts have developed a perceptive line of case law where they gradually dismantled the marital exemption; this meant, according to the court, that there had been a reasonable degree of foreseeability regarding the risk of criminalisation; and (ii) the foreseeability of the criminalisation here was also reinforced by the exceptionally heinous nature of the offence (the debasing character of rape) that according to other Convention rights, such as human dignity and the concept of civilised marriage, was not to be sustained. In other words, according to the court, the individual himself should have foreseen the criminal nature of his behaviour based on the immorality of his action that is at variance with the existing status and protection of the human rights of his victim.

The first argument of the ECtHR reinforces the position of jurisprudence as an organism of law, which may have a communicative value to individuals. Although this may be approached as an element that would be of more relevance to the common law systems, this argumentation has also been employed by the German Constitutional Court. In fact one of the arguments of the German court for quashing the interpretation of 'force' as also including psychological force was the lack of a consolidated view in jurisprudence and literature that would enable individuals to draw guidance from those sources. This argument has been followed also in other cases, where the court made an effort to deduce from jurisprudence a behavioural pattern.[72]

The second argument of the ECtHR is far more interesting, however. The court here was confronted with the highly immoral act, an (attempted) rape, which was arguably not criminalised when it was committed. While one should see both arguments of the court together (and therefore also accept that some foreseeability based on the existing case law might have existed), the ECtHR here weighs the legality principle, as a human right, with other rights of the Convention (human dignity, sexual integrity, etc.). In other words, the court weighs the claim of the husband to foreseeable criminalisation with the claim of this victim of respect of her dignity. This weighing is especially motivated by the nature of the ECtHR as a human rights court. The legality principle itself is not treated as an absolute dogma which functions in a 'take it or leave it' fashion, but as a principle with a rather underdetermined structure, which must be concretised in every ad hoc case.[73] Without indicating the specific interests involved in an ad hoc case, the legality principle remains an abstract principle that is indifferent to the context of every conflict. In the marital rape case, the judges of the European court had to consider the rights involved in the particular circumstances.

This 'weighing' of interests can also be seen in the German decision, albeit more subtly. The German court explored the possibilities of the wording of the text in the light of the specific situation at hand. It asked itself: how much flexibility should the criminal liability on 'coercion' bare? How open and expanded should this norm be? This question can only be argued in the light of the circumstances of the case, i.e. the right to demonstrate and the sensitive issue of criminalising a 'passive act' such as psychological intimidation in the specific context of the German society. What is more, the German court also investigated the impact of the interpretation to future cases. The right of the defendant to foreseeable liability was successfully granted when the court realised that the criminalisation of psychological force would create chaos in future cases. The consequences of extending criminal liability to psychological force would be problematic to reconcile with the right on individual autonomy. The norm would become so 'open' that it would be impossible to predict which emotional intimidating acts are 'coercive' and which are not. One can imagine various everyday tense interactions involving peer pressure and power games; all of these are physiological intimidation that could under certain conditions inflict harm on us. If we were to accept that the crime of 'coercion' should also include emotional force, it would be difficult to foresee future outcomes in interpretation.

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[72] 10 March 2009 BVerfG NJW 2009, 2370.

[73] E. Claes, 'Criminal justice, legality and human dignity' in E. Claes, R. Foqué and T. Peters (eds.), Punishment, restorative justice and the morality of law (Intersentia 2005), p. 33.

Finally, a similar 'weighing of interests' is also to be found in Dutch jurisprudence, where courts have interpreted criminal liability (for example in cases involving child pornography and kidnapping by means of illegal adoption),[74] with a view to the legal interests protected. These tendencies have prompted a response from the Dutch academia, which have approached the problem of interpretation not so much in connection with the methods used, but with the transparency of the courts' reasoning.[75] What has been increasingly observed is a need to control how judges translate the interests involved in a case, how they weigh them, whether they make distinctions between policies and rights and with which criteria they prioritise them.[76]

6. CONCLUDING REMARKS

This chapter set out to analyse the principle of legality, which is one of the cornerstone principles of criminal law and aims at the protection of individual vis-à-vis arbitrary state action. This principle, although it belonged to the continental traditions, has by now also been embedded in the common law systems. Despite this convergence, the principle of legality faces various difficulties in its application. Legal certainty cannot be assured to the greatest possible extent and individuals are expected to pay heed not only to developments in jurisprudence but also in society more general. It is often stated in literature that the legality principle has been eroding.[77] While this certainly can be witnessed, it is not necessarily the case that this principle cannot adapt itself to the constantly changing nature of criminal law. There is a growing tendency in literature to search for new ways with which judicial interpretation can be legitimised. As with the ECtHR's re-interpretation of this principle, new theories for the legality principle have recently been emerging that adapt this concept to the current status quo of our criminal systems, while preserving its strong protective nature.[78]

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[74] HR 21 November 2001 NJ 2003, 632; HR 21 April 1998 NJ 1998, 782; K. Rozemond, 'Legaliteit in het materiële strafrecht' RM Themis (1999), p. 125.

[75] E. Claes, 'Legaliteit en rechtstvinding in het strafrecht' (Universitaire Pers Leuven 2003), p. 467; M.J. Borgers, 'De communicatieve strafrechter', in W.J.M. Voermans, M.J. Borgers and C.H. Sieburgh, Controverses rondom legaliteit en legitimatie (Kluwer 2011).

[76] B.Z. Tamanaha, 'Law as a means to an end: threat to the Rule of Law' (Cambridge University Press 2006), p. 242.

[77] B. Jähnke, 'Zur Erosion des Verfassungssatzes 'Keine Strafe ohne Gesetz' ZIS (2010), pp. 463–470.

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[78] R. Dworkin, 'A Matter of Principle' (Harvard University Press 1985), p. 11; K. Rozemond, 'Legaliteit in het materiële strafrecht' (RM Themis 1999); R. Foqué and A.C. 't Hart, 'Instrumentaliteit en Rechtsbescherming' (Gouda Quint/Kluwer 1990), p. 116; E. Claes, 'Legaliteit en rechtsvinding in het strafrecht' (Universitaire Pers Leuven 2003).

CHAPTER IV

ACTUS REUS AND MENS REA

The Elements of Crime and the Framework of Criminal Liability

Johannes KEILER

1. INTRODUCTION

Although criminal justice systems differ quite significantly as to their general approach towards criminal behaviour, it is nevertheless possible to identify on a doctrinal level some interesting communalities. For instance, most penal systems seem to agree that paradigmatically the main elements of a criminal offence are twofold, namely harm and fault. The former is primarily an external element: some form of conduct or state of affair which causes harm (to others) and which falls within the ambit of criminal law needs to occur. For example, the external element in murder is frequently defined as the killing of another human being. This external element is often referred to as the actus reus of an offence. This term, which literally translates into 'bad act' sets out the objective thing that needs to materialise before criminal law can be invoked.

Fulfilment of the actus reus element alone is generally however insufficient to constitute a criminal offence. Consider the example of a driver who one fine night drives down a dark road, adhering to all the pertinent traffic regulations, when suddenly a heavily intoxicated pedestrian cuts in front of his car and is killed on impact. Objectively, the actus reus of murder seems to be fulfilled in this scenario. Yet the driver can arguably not be blamed for the death of the victim. He acted without fault and therefore the incident ought to be classified as a tragic accident, rather than a criminal offence. Thus, next to an objective element criminal offences generally also consist of a subjective element. This subjective element is often referred to as mens rea or 'guilty mind'.

Accordingly, each crime can be split into an actus reus, the objective element of a crime and a mens rea, the mental or subjective element of a crime.[1] In order to incur criminal liability, a perpetrator generally needs to fulfil the actus reus and mens rea of the respective crime. This legal fact often finds expression in the famous Latin phrase *actus non facit reum nisi mens sit rea,* which can loosely be translated as 'an act does not make a man guilty unless his mind is (also) guilty'. This dichotomy arguably stems from the distinction between the objective or tangible side of a person's conduct, which is susceptible to objective assessment and the intangible, subjective side of a person's conduct, i.e. his state of mind, which is not. In order to be held criminally liable the two concepts need to coincide, as a person cannot be held liable in a liberal society for conduct which he either did not intend or merely 'contemplated about' (thoughts are free).

These two concepts, actus reus and mens rea, are generally thought to constitute the basic building blocks of criminal liability in general and of every criminal offence in particular. However, the two are heterogeneous concepts and can carry different connotations. As will be shown in more detail below, the concept of actus reus can not only be conceived as a constituent element of the offence definition but can furthermore be seen as a collection of principles and doctrines concerned with the *objective* attribution of criminal liability; the same applies to the notion of mens rea regarding the *subjective* attribution of liability. The terms actus reus or mens rea respectively can thus best be seen as an analytical tool for theorists and practitioners which helps to guide and understand the discussion and application of these doctrines.

However, it should furthermore be kept in mind that some exceptions to the basic rule that criminal liability *always* requires an assessment of actus reus and mens rea can also be found in practice, most notably in the form of so-called strict liability offences, which will be discussed in more detail below.[2]

Finally, it should already be pointed out here that the distinction between actus reus and mens rea is not a hard and fast one. The two concepts do not constitute a strict dichotomy but rather constitute interrelated concepts. The notions of actus reus and mens rea are perhaps best perceived as communicating vessels. If the objective requirements of a criminal offence are stringent the subjective requirements may be lower. What is required is that an overall assessment of the two concepts warrants the conclusion that the defendant can justly be held liable for his deeds. In the converse situation where the objective threshold for liability is low, as is for instance the case in regard to criminal attempts and preparation where the objectively perceivable conduct is often outright innocuous, a higher standard will generally be required by subjective requirements in order to ensure that the overall benchmark for the imputation of liability does not fall below a certain threshold.

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[1] However, the terminology applied varies between the different penal systems. While actus reus and mens rea are typical common law concepts, German scholars tend to distinguish between '*objektiver und subjektiver Tatbestand*' and Dutch scholars refer to the two components as '*objectieve en subjectieve zijde van het strafbaar feit*'.

[2] See also: Chapter VII, section 4.

2. ACTUS REUS AND MENS REA

2.1. ACTUS REUS

As already mentioned, the concept of actus reus can carry different connotations. At a purely descriptive level the element of actus reus outlines the (objective) conduct made criminal by some statutory offence or other valid source of criminal law. It is prima facie fulfilled if a person has committed an instance of the type of conduct described in it. Take for instance Article 157 DCC which criminalises arson. The first limb of the Article provides: 'A person who intentionally brings about a fire, an explosion or a flood is liable […].' In this case the actus reus thus consists of causing a fire, an explosion or a flood.

At a more normative level however, the core function of the notion of actus reus, besides being a conceptual tool, is arguably to establish a link between the person and the occurred criminal harm.[3] If such a connection can be established, criminal liability can be imposed and the person will be deemed to be the perpetrator of the occurred harm. Thus, the concept of actus reus translates an empirical event into a criminal one.

It is generally thought that the actus reus of a criminal offence can, but need not always, consist of three elements, namely *conduct*, *consequences* and *circumstances*. While most offences do require some form of conduct, some offences also punish a prohibited state of affairs such as being an illegal immigrant or other situations such as the possession of illegal drugs, unlicensed firearms or burglary tools, in which the formal requirement of conduct is more implicit and less visual.[4] However, often the circumstances or consequences surrounding a certain conduct are also relevant and even determinative of the wrongdoing committed.

The paradigmatic example of a consequence enshrined in the actus reus of an offence is for instance the death of another human being in the offence of murder. The death of the victim, a consequence, is a constitutive part of the offence definition as well as the wrongdoing at hand. It is the harmful consequence that gives murder its special moral and social significance. This may also explain why the conduct element remains quite unspecific in this offence. Any conduct causing the death of another is prohibited. Murder is murder regardless of whether done by shooting, stabbing, suffocating, poisoning, punching, etc.

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[3] A.A. Van Dijk, 'Strafrechtelijke Aansprakelijkheid heroverwogen – Over opzet, schuld, schulduitsluitingsgronden en straf' (Maklu 2008), p. 7.

[4] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 80 et seq.

Finally, an actus reus can also encompass certain further circumstances. These can for instance require certain qualities in the person who commits the crime or a further list of conditions which need to be fulfilled in order for criminal liability to arise.[5] Circumstances are thus facts which further specify the actus reus. Take for instance the offence of handling stolen property. The fact that the property in question is stolen, which the offender could or should have been aware of can be seen as a circumstantial element as it further specifies the actus reus of the offence. Other pertinent examples are bigamy, which requires getting married (the conduct) while already being married to someone else (the circumstance), or the actus reus of rape, which consists of sexual intercourse (the conduct) in circumstances where the victim does not consent. Note that no further consequence is necessary in these offences. The actus reus thus consists here (merely) of an element of conduct which is further specified by circumstantial elements.

In Germany and the Netherlands circumstances are usually part and parcel of the actus reus and are therefore seldom explicitly distinguished. The distinction is however of importance in English law where the different elements of the actus reus can be subject to different mens rea standards. As will subsequently become apparent in the realm of attempt liability, English law often requires intention as to the consequence element of the actus reus while a lower degree of fault is often considered sufficient in regard to the circumstantial element.[6]

In any case, the exact content of the actus reus depends of course on the particular underlying offence, and influences what elements the prosecution needs to prove. Depending on the constituent elements of the underlying offence, one can distinguish different categories of crimes.

One of the most basic distinctions is the one between conduct and result crimes. Result crimes are offences for which the law requires a specific result to occur; the most prominent examples being murder, manslaughter, wounding, etc. Hence, the offence definition here requires conduct, causation and fault to be proven. Conduct crimes, like perjury or rape, on the other hand, do not require a specific result, but are consummated once the prohibited conduct has taken place. Thus, only conduct and fault need to be proven here; a causal connection is not required. An intentional wrongful testimony in court will accordingly amount to the offence of perjury, regardless of whether or not the judge believed the witness or based his verdict on the statement.

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[5] Note that the qualification of offences in Germany and partially also in the Netherlands is complex and overly dogmatic. See: J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 66–84; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 329–342. The Dutch and German penal systems also include the category of endangerment offences which do not require the occurrence of criminal harm, but are already consummated when a danger to a legally protected interest has been created.

[6] See: Chapter IX, section 4.5.2.

With regard to conduct crimes the wrongdoing is constituted by the conduct itself, whereas result crimes prohibit a wide range of conduct if they lead to the proscribed harm. By contrast, in relation to another category of offences, inchoate crimes, the subjective disposition of the offender seemingly constitutes the primary ground for responsibility.

In any case, it is moreover possible that only conduct and causation need to be proven, regardless of fault. These crimes are often referred to as strict liability offences. Strict liability offences constitute an exemption to the principle of guilt enshrined in the Latin phrase *nulla poena sine culpa* (no punishment without guilt) and can arguably only be justified on utilitarian reasons of effectiveness and efficiency. In addition strict liability offences constitute an exception to the aforementioned general rule that criminal liability *always* requires an assessment of actus reus and mens rea. Strict liability offences are an integral part of the English and Dutch penal system and are often utilised in economic and regulatory offences. Many traffic or environmental offences are for instance often drafted as strict liability offences. Consider the offence of speeding. With this offence it generally need not be proven that a driver *intended* to exceed the legal speed limit. The simple fact that (s)he did is, exceptional circumstances aside, sufficient for liability to arise. In this example one can already sense the underlying considerations of efficiency. It would be very onerous and perhaps even outright impossible to require the prosecution in all these cases to prove that the defendant intentionally and knowingly exceeded the speed limit. This would arguably severely undermine the efficiency of the law and render the legal norm nugatory. Be that as it may, in Germany however, where the principle of guilt is interpreted rather strictly as it enjoys constitutional status and is also implied in §§15 and 18 GCC, strict liability is generally rejected, even for traffic offences, which are dealt with under administrative law.[7]

Finally, as already mentioned, the concepts of actus reus and mens rea can also take a broader meaning in legal theory. They can also function as collective terms under which a variety of different doctrines are subsumed. Recall that an actus reus can (but need not necessarily) consist of conduct and a proscribed consequence. From this, two questions may arise. Firstly, what does it mean to act in a way that is relevant for criminal law and secondly how can we establish a link between the defendant's conduct and the harmful event that occurred?[8] The concept of actus reus is therefore generally considered to include the doctrines of conduct (including omissions), as well as causation.[9] Thus, the term actus reus can in fact also refer to a collection of entirely distinct doctrines with different functions.[10] Hence, it can be said that the actus reus is very much a heterogeneous concept.[11]

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[7] See: Chapter VII, section 4.

[8] These questions will be addressed in more detail in the Chapters V and VI.

[9] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 2; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 306–307; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 50–111; J. de Hullu, 'Materieel Strafrecht – Over algemene

Having discussed the notion of actus reus we can now turn to the concept of mens rea.

2.2. MENS REA

The term mens rea or 'guilty mind' is traditionally used to refer to the mental or subjective element required by the offence in question. Criminal theory generally distinguishes different variations of fault. Combining the approaches of common and civil law systems it is possible to distinguish between direct intent, indirect intent, dolus eventualis, recklessness and conscious and unconscious negligence.[12] These different variations of fault fulfil a crucial grading function in criminal law as they reflect differences in culpability of the actor(s) as well as differences in reproach directed at the defendant. Generally speaking we consider the intentional actor most reprehensible and culpable. Wilfully and intentionally causing harm seems more condemnable than causing harm inadvertently. Even young children are aware of this distinction and often try to excuse their misdeeds by claiming that they did not do it on purpose. Likewise, it seems a matter of course that intentionally shooting one's partner because of infidelity is worse than killing one's partner inadvertently by carelessly dropping the gun, causing it to fire.

This distinction between intentional and inadvertent wrongdoing finds expression in the common distinction between murder and negligent manslaughter. Both are homicide offences but one is committed intentionally and the other by a failure to comply with certain standards of care enforced by criminal law. This qualitative difference is also reflected in the degree of punishment imposed by the respective offences. Murder usually carries the highest sentence available in a penal system, while negligent manslaughter is usually punished less severely. All other things being equal, intentional wrongdoing is thus punished more severely than negligent wrongdoing.

Traditionally, mens rea is understood as a state of mind, a psychological disposition that relates to the actus reus of the offence in question. While such a definition is unproblematic with regard to intentional crimes, the focus on a state of mind or a psychological disposition can cause problems with regard to crimes

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leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 153–190.

[10] P.H. Robinson, 'Should the Criminal Law Abandon the Actus Reus – Mens Rea Distinction?', in S. Shute, et al. (eds.), Action and Value in Criminal Law (Clarendon Press 1993), pp. 187–211.

[11] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 83–86.

[12] See: Chapter VII.

of negligence. Crudely put, negligence requires a failure to comply with a certain standard of diligence when acting. The actor failed to perceive a substantial and unjustified risk of producing the relevant harm when he should have been aware and more attentive. It seems evident that a failure to perceive a certain risk can hardly be considered a state of mind. Rather it constitutes the absence of a state of mind.[13] Some scholars have therefore argued that negligence is not really fault as it does not amount to a state of mind and can therefore not provide a proper basis for criminal liability.[14] Despite this criticism, negligence offences are omnipresent and widely accepted in civil law countries such as Germany and the Netherlands. Most intentional offences there have a negligent counterpart, given the underlying protected legal interest is considered significant enough. Common law countries on the other hand are a bit more retentive regarding negligence liability. Research for instance has shown that in 1996 not even five per cent of all offences triable in the English Crown Court were crimes of negligence.[15] This retentiveness can to some extent be explained by the aforementioned argument that negligence cannot properly be considered a form of mens rea. Nevertheless, many common law scholars have argued strongly for the recognition of negligence as a fault element and have therefore paved the way for a better incorporation of the concept in the framework of liability.[16] Yet this does not diminish the fact that negligence liability is still not as accepted and popular as for instance in Germany or the Netherlands.

Somewhat confusingly the term mens rea can (in common law) sometimes denote two different things. First, it can be used in a *descriptive* sense, in which case the term simply refers to the different forms of intention required by a specific offence. This descriptive aspect of mens rea then refers to different categories of fault such as direct and indirect intent, dolus eventualis (in civil law countries), recklessness and negligence. When referring to a certain form of mens rea required by a particular offence we generally thus use the term mens rea in its descriptive sense.

The term can however also carry a *normative* meaning. Utilised this way the term is often interpreted to presuppose voluntary and responsible conduct. The basic premise here is that criminal law should only punish the guilty. Guilty are those offenders who can fairly be blamed for the wrongdoing they committed. It follows that a defendant cannot be considered guilty if he is not legally capable of committing the offence.[17] 'What is crucial is that those whom we punish should have had, when they acted, the moral capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities'.[18] Used in this sense the term mens rea thus carries overtones of culpability and blameworthiness. More will be said about the descriptive and normative aspects of mens rea and blameworthiness respectively below. For now, it is sufficient to keep in mind that the term mens rea can have different connotations and that scholars not always clearly distinguish between these different aspects.

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[13] J. Blomsma, '*Mens rea* and defences in European criminal law' (Intersentia 2012), p. 44.

[14] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 117.

[15] J. Blomsma, '*Mens rea* and defences in European criminal law' (Intersentia 2012), p. 173. See also: A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 181 et seq.

[16] See: H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), pp. 136–157.

[17] See: G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 99.

Finally, it should be mentioned here that, just like its counterpart actus reus, the concept of mens rea also functions as a collective term in criminal law under which a multitude of different doctrines are subsumed.

Having discussed the different facets generally subsumed under the heading of actus reus and mens rea it is now time to turn our attention to two distinct ways of thinking about the internal structure of criminal offences. Common and civil law countries have developed different ways of thinking about the deep structure of offences. Two distinct basic systems have gained adherence which can be categorised as the bipartite and the tripartite mode of analysis.

3. THE FRAMEWORK OF CRIMINAL LIABILITY: THE BIPARTITE AND TRIPARTITE SYSTEM

Criminal liability is often assessed according to a certain structure or framework. This framework constitutes another analytical tool in which criminal liability is assessed. It helps to structure and outline doctrines, concepts and principles in a systematic manner and provides practitioners with a logical scheme to assess the different elements.[19] English courts have traditionally followed a bipartite system simply distinguishing between objective (external) and subjective (internal) aspects of crime. Thus, criminal liability is deemed to require that a person commits the actus reus of an offence and possesses the corresponding mens rea.[20] The framework for assessing liability in this case simply requires that the two basic elements of a criminal offence, i.e. actus reus and mens rea, are fulfilled and coincide.

While the bipartite system offers the convenience of theoretical simplicity, it arguably also has some inherent shortcomings. For one, it fails to account for the entire range of defences that are grouped under the categories of justification and excuses. Notions such as self-defence or insanity involve many complexities that cannot easily be analysed as part of either actus reus or mens rea.[21] This may partially explain why English courts generally do not explicitly distinguish between justifications and excuses but rather refer to liability-negating circumstances as defences.

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[18] H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), p. 152.

[19] See: K. Ambos, 'Toward a universal system of crime: Comments on George Fletcher's Grammar of Criminal Law' Cardozo Law Review (2007), pp. 2647–2673.

[20] See for instance: D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 52–53.

[21] G.P. Fletcher, 'The Grammar of Criminal Law' (Oxford University Press 2007), p. 45.

A related but nevertheless distinct problem can be found in the fact that this approach conflates the two meanings of mens rea, i.e. mens rea in the descriptive sense (or the fault element of an offence) and mens rea in the normative sense (or blameworthiness). The two concepts however denote different things. A person could have fulfilled the objective elements of a criminal offence (i.e. actus reus) with the corresponding fault element (i.e. mens rea) but still be able to escape liability due to the absence of blameworthiness. The latter is usually negated when an excusatory defence such as a mistake of law or duress is applicable. If Bart for instance provides false information to an authority, making him eligible for subsidies, not knowing that this constitutes a criminal offence (subsidy fraud) he will have committed the actus reus of the offence and has also acted intentionally with regard to the incorrectness of the information.[22] However, whether he can be blamed for his mistake is an entirely different question.

Many civil law systems, such as Germany and the Netherlands, have therefore developed an entirely different framework for assessing criminal liability. According to the prevalent tripartite structure of crime the assessment of criminal liability takes place in three stages. In stage one it needs to be assessed whether or not the legal elements of the statutory offence definition (i.e. actus reus and mens rea) have been fulfilled. In the second stage the wrongfulness (*Rechtswidrigkeit*) of the conduct in question is assessed, while the third stage is devoted to assessing the blameworthiness of the defendant (*Schuld*). Thus, the issues in the tripartite framework of criminal liability line up in the following way:

1. fulfilment of offence definition (actus reus and mens rea)
2. wrongdoing
3. blameworthiness

This distinction between the fault element of an offence (mens rea in the descriptive sense) and blameworthiness (mens rea in the normative sense) is the result of the long and complex evolution of criminal theory.[23] This development started with the discovery of intrinsic subjective elements which were part and parcel of the actus reus of certain offences. For instance, in order to be liable for theft under German law the defendant need not only (intentionally) take away chattels belonging to another but must in addition also possess the ulterior intent to deprive the owner permanently of his property.[24] Thus, if a group of adolescents take away someone else's car in order to drive around town or conduct street races, but do not want to keep the car, they have not committed theft but are instead liable for the unlawful taking of a motor vehicle pursuant to §248 (b) GCC. Thus, in these offences the ulterior intent is part of the definition of the act and necessary to capture precisely the conduct sought to be prohibited.[25] This 'subjectification' of the actus reus perhaps becomes the most visible in the context of inchoate offences, as in instances of preparatory or attempt liability the objective conduct of the defendant will often be innocuous and only acquires criminal significance in combination with the defendant's mens rea.

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[22] Example taken from: K. Ambos, 'Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections' Maastricht Journal of European and Comparative Law (2005), p. 179.

[23] K. Ambos, 'Toward a universal system of crime: Comments on George Fletcher's Grammar of Criminal Law' Cardozo Law Review (2007), p. 2657.

The final step towards the development of the tripartite system arguably came with the emergence of Hans Welzel's teleological theory of conduct.[26] Although the theory was ultimately rejected as a definition of the act requirement its basic tenet, that acting and intending are bound together led to the adoption of the tripartite structure of crime in Germany.[27] As human conduct is intrinsically purposive, it also contains a mental element expressed in the wish, desire and knowledge that the act produces a certain result. By partially including intention in the actus reus, the concept of guilt became more normative and gained an independent place in the structure of crime which amongst others led to the integration of justification and excuses into the structure of crime. Accordingly, as already discussed, the evaluative structure of crime in Germany today consists of (i) the offence definition, (ii) wrongdoing and (iii) blameworthiness.

As already mentioned, an important consequence of accepting an autonomous concept of blameworthiness is that it leads to a doctrinal separation of wrongfulness and blameworthiness which in turn finds expression in the distinction between justifications and excuses as grounds for negating criminal responsibility.[28] If a defendant has committed the actus reus and mens rea of the offence definition, the presence of wrongdoing and blameworthiness is generally assumed. However, should he be able to rely on certain liability negating circumstances as outlined in a defence, wrongdoing or blameworthiness may be negated. With regard to defences, civil law countries frequently distinguish between justifications and excuses. A successful justificatory defence such as self-defence and necessity as a justification may for instance remove wrongdoing, while a successful excusatory defence such as insanity or duress is sought to deny blameworthiness. The importance of the distinction between justifications and excuses or wrongdoing and blameworthiness respectively is nicely demonstrated by the following famous English case.

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[24] See: §242 GCC.

[25] K. Ambos, 'Toward a universal system of crime: Comments on George Fletcher's Grammar of Criminal Law' Cardozo Law Review (2007), pp. 2657 et seq.

[26] For further discussion on the teleological theory of conduct see: Chapter V, section 2.1.2.

[27] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 247.

[28] K. Ambos, 'Toward a universal system of crime: Comments on George Fletcher's Grammar of Criminal Law' Cardozo Law Review (2007), p. 2660.

> **R v Dudley and Stephens [1884] 14 QBD 273**
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> [The defendants Dudley and Stephens in this case were seamen on an English vessel which was cast away in a storm 1,600 miles from Cape Hope. Together with a young cabin boy named Parker they were compelled to wait for rescue in a small lifeboat with hardly any food or water. Desperate times call for desperate measures. On the 19th day of their odyssey, feeling more dead than alive, Dudley suggested that they should draw lots as to which of them should be killed for the others to feed on. Barbaric as this may seem this actually constituted a socially accepted custom of the sea in these days.[29] First they abandoned the idea but as desperation grew they decided to kill and feed on Paker who was ailing, far sicker than the others and had neither wife nor children. On the 24th day of their journey they were rescued by a German bark and subsequently charged with murder. Throughout the trial public sympathy was almost exclusively on the side of the 'cannibals'.
>
> The court in this case was confronted with the daunting challenge of finding a basis in common law either to justify or excuse murder in extremis. Self-defence was clearly not applicable and necessity, as the court explains, was not applicable to the offence of murder. Unable to rely on the distinction between wrongdoing and blameworthiness the only available options were a conviction (giving rise to the death penalty) or an outright acquittal. The court thus found itself caught between a rock and a hard place – JK.]
>
> LORD COLERIDGE, C.J.
>
> '[...] Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be *287 justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. [...] It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. "Necesse est at eam, non at vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. [...] It is not needful to point out the awful danger of

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[29] For further examples see: L. Katz, 'Bad acts and guilty minds: Conundrums of the Criminal Law' (University of Chicago Press 1987), pp. 17–26.

> admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more **288* necessary to kill him than one of the grown men? The answer must be "No" –
>
> [...] There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.
>
> It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was willful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.
>
> THE COURT then proceeded to pass sentence of death upon the prisoners.'

Thus, the judges refused to recognise self-preservation as an all-justifying end and interpreted the law to require the sacrifice of one's own life in direst need, which arguably seems overly idealistic and slightly out of tune with the reality of human nature. However, although the court formally imposed the death sentence on Dudley and Stephens a pardon had been arranged well in advance and the Queen heeded the widespread understanding at the time that no one could blame shipwrecked sailors for giving in to the strong human instinct of self-preservation. The Crown accordingly commuted the sentence to six months' imprisonment. While one may certainly consider this a just outcome, it should not be overlooked that a pardon cannot be considered a substitute for an acquittal. Dudley and Stephens might have escaped the death penalty but were nevertheless found guilty of the crime of murder.

In the tripartite system, such cases can be dealt with differently due to the justification/excuse divide. While killing another (innocent) human being for the sake of one's own survival certainly fulfils the offence definition of murder and is therefore wrongful, no one can arguably be blamed on a personal level for giving in to one of the strongest and most compelling human instincts, i.e. self-preservation. The justification/excuse (or wrongfulness/blameworthiness) distinction neatly captures this difference and arguably also conveys the right message to citizens, a fact the English court struggled with in the above case were they to acquit the defendants. In the tripartite system the message is loud and clear. Killing an innocent in order to save one's own skin is wrong in principle and cannot be condoned by the legal order, yet on a personal level no one can be blamed for giving preference to their own life (in certain desperate situations).

Although the tripartite structure of crime might perhaps provide for a more transparent solution in these cases, it does not necessarily follow that this framework is generally superior to the bipartite structure. The tripartite structure of criminal liability increases the doctrinal complexity in a criminal justice system which can give rise to its own intricate doctrinal problems.

Finally, from a comparative perspective an interesting question in this context is how the bipartite and the tripartite structure can be reconciled. The differences seem great on first sight, but matters may become clearer once we recall that the common law concept of mens rea carries a descriptive as well as a normative connotation. In the tripartite structure the concept of mens rea in the first stage of the evaluation scheme is thus reduced to its purely descriptive connotation while the normative aspect of the concept has been forged into a separate assessment category (stage 3 – blameworthiness). Likewise, the notion of wrongdoing is in common law systems often implied in the concept of actus reus which is often seen to require that the conduct in question was in violation of the law and thus wrongful.

4. CONCLUDING REMARKS

The main focus of this chapter was on the basic building blocks of criminal liability in general and of any criminal offence in particular, i.e. actus reus and mens rea. It has been attempted to show that behind this seemingly simple dichotomy, a variety of doctrinal subtleties and predicaments lurk. One complicating factor has been that both concepts can carry different connotations. When used descriptively they refer to the objective elements of a criminal offence, comprised of conduct, consequences and circumstances, or respectively to the different degrees of fault enshrined in criminal offences such as intent, recklessness or negligence.

The terms can however also acquire a broader meaning in which case they refer to the different doctrines that generally relate to the two concepts. In this sense the term actus reus encompasses the doctrine of conduct (including omission liability) as well as the doctrine of causation. With regard to mens rea, the term can also be used in a normative sense in which case it carries overtones of blameworthiness and culpability.

Besides these basic concepts attention has also been devoted to two different frameworks used by common and civil law countries to structure the assessment of criminal liability. While common law countries generally adhere to a bipartite system, many civil law countries apply a tripartite framework. The differences in the applied analytical framework have been shown to have far reaching implications for other doctrines, most notably the ones of justifications and excuses and can therefore also help to better understand the different approaches concerning defences in common and civil law. However, in spite of the obvious differences between common and civil law, it has also been shown that the underlying principles of criminal liability largely correspond to each other which helps us to unearth and comprehend the philosophical premises of almost universal validity on which criminal law rests. Equipped with this analytical toolkit we can now venture further down the rabbit hole of criminal liability.

CHAPTER V
COMMISSION VERSUS OMISSION

Johannes KEILER

1. INTRODUCTION

Regardless of the qualification of offences, there is one common element without which no criminal liability can arise. Normally, the actus reus doctrine requires some sort of conduct, something 'done' by the defendant. Thus, all penal systems generally agree that the imposition of criminal liability requires at the very least some form of conduct, controlled by the perpetrator. Human conduct can however take different forms. Humans can bring about certain results by either taking positive steps to achieve a certain result or by failing to intervene and let events run their course when the law would have demanded an intervention. Traditionally legal doctrine stipulates that criminal liability is predicated on some form of positive action. Therefore, this fundamental requirement is in legal theory also often referred to as the 'act requirement'. However, the term act requirement is slightly misleading as it suggests that the imposition of criminal liability *always* requires an (voluntary) *act*. This is however a misconception as criminal justice systems also frequently punish the culpable *omission* of an act expected of a person by law. This suggests that there may be more to acts than mere voluntary *movements*.[1] In this chapter we will therefore discuss not only offences of commission, but also different kinds of criminal omissions.

2. OFFENCES OF COMMISSION: THE THEORY OF CONDUCT AND THE BASELINE OF CRIMINAL LIABILITY

A fundamental question is whether or not a conduct has occurred which warrants the application of criminal law and sanctions. Holding people liable even though they have done nothing wrongful (e.g. due to their race, religion, political or sexual orientation, political affiliations, etc.) would not only fail to respect citizens' autonomy but would furthermore make the application of criminal law an arbitrary and oppressive enterprise. Criminal law ought to treat citizens as responsible subjects rather than objects of state coercion and is therefore generally thought to be founded on the principle that a person must have been *responsible* for his or her actions in order to be held criminally liable and to be punished.[2] Responsibility is frequently assigned to subjects rather than objects. 'A subject is someone who acts, and an object is someone or something that is acted upon'.[3] It seems absurd to us nowadays to hold a door responsible for being closed after having inadvertently bumped into it, and nor would we assign responsibility to a horse for kicking its rider. Yet in the Middle Ages animals were frequently held responsible for the harm they caused and until the 19th century the practice of imposing a fine on an inanimate object (deodand) persisted in English law.[4] Since then our conception of responsibility has however changed and it is now widely recognised that only subjects can incur responsibility. What this concept of responsibility exactly denotes is however a philosophical question. While a variety of explanations for the foundation of responsibility in criminal theory (such as choice and character) are conceivable, the prevalent view considers a certain set of capacities key for criminal responsibility. We will briefly discuss these different capacities in a subsequent section. For now it suffices to note that the act requirement provides an important link to the theoretical and philosophical foundations of criminal law and thereby helps to determine and shape the contours and demeanour of any criminal justice system.

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[1] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 80.

2.1. DIFFERENT THEORIES OF CONDUCT

Over the years myriad different theories have emerged that try to establish a unitary concept of conduct that can serve as a basis for the process of attributing criminal liability.[5]

2.1.1. The causal theory of action, or the ghost in the machine

One theory of conduct that has greatly influenced the criminal law's perception of conduct for many years is the 'causal theory of action'. According to this theory, a criminal act consists in a 'willed muscular contraction' or a 'willed bodily movement'. This theory is based on a 19th-century dualistic concept of man as creatures of *animus* and *corpus*. In other words, the *animus*, i.e. the human will, was seen as the cause of physical action as willed bodily movements. Modern psychological insights have however shed some doubt on this vision. The division of *animus* and *corpus*, or the dogma of the ghost in the machine, seems too simplistic to explain the many facets of human nature.[6]

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[2] See: 'Criminal liability: Insanity and Automatism – A Discussion Paper' [LAW COM 23 July 2013], p. 197.

[3] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 43.

[4] 'Criminal liability: Insanity and Automatism – A Discussion Paper' [LAW COM 23 July 2013], p. 205.

[5] It is however questionable whether such a unitary concept of conduct covering all offences to be found in criminal law is achievable at all.

In its early days the causal theory of action was the prevalent theory in the German[7] and the Dutch[8] penal system, but both systems have by now discarded the theory due to its apparent shortcomings. In the English penal system the theory is by and large still accepted.[9] However, in England scholars have also strongly criticised the traditional causal act requirement and have proposed different theories of conduct.[10]

Despite its influential nature, the causal act requirement from the early 19th century is no longer able to capture the ever-expanding ramifications of modern criminal law. Even if in many cases criminal conduct will undoubtedly involve bodily movements, this is not always necessary, as modern human conduct, assisted by modern technologies, has reached a level of sophistication that can no longer exclusively be defined in terms of willed bodily movements. The shortcomings of this theory become particularly apparent with regard to omission liability.[11] If one conceives human action pursuant to the causal theory as willed bodily movements, it becomes clear that omissions do not readily fit this description of conduct. Moreover, such a strict focus on human behaviour becomes unworkable in the context of corporate wrongdoing. Many penal systems nowadays impose punishment on corporations for criminal harm caused by them. It seems obvious that the conduct of corporations can hardly be reconciled with the description of conduct as willed bodily movements.

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[6] See for instance: H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), p. 101.

[7] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 241–24; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 38–40.

[8] E. Gritter, 'Functioneel plegen door een natuurlijke persoon', in van der Leij (eds.), Plegen en Deelnemen (Kluwer 2007), p. 6.

[9] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 59–60; G. Williams, 'Criminal Law: The General Part' (Stevens & Sons Limited 1953), p. 15. For a different approach see: W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 80.

[10] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), pp. 77–81; R.A. Duff, 'Answering for Crime' (Hart Publishing 2007), pp. 95–12; A.P. Simester, 'On the so called Requirement for Voluntary Action' Buffalo Criminal Law Review (1998), pp. 403–430. See also: G.P. Fletcher, 'On the moral irrelevance of bodily movements' University of Pennsylvania Law Review (1994), pp. 1443–1453.

[11] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 242.

2.1.2. *The teleological theory of action: human conduct is 'seeing', not blind*

The shortcomings of the causal theory of action led the German scholar Hans Welzel to develop an entire school of criminal law based on the rejection of the theory. In his teleological (or goal-orientated) theory of action he argued that human action was intrinsically purposive and not merely the external manifestation of an inner mechanism.[12] The crucial difference between the two theories thus is that the content of the will plays no role in the concept of action in the causal theory, while in the teleological theory the content of the will, i.e. the aim, constitutes an element of the very concept of action. It was argued that action was not blind, it was 'seeing'. As human action has an inherent teleological component, one cannot understand the nature and meaning of an action unless one also knows the actor's purpose. For certain offences this insight is certainly correct. For instance, if someone is colour copying banknotes, it can be that his intention is to forge money or to carry out a practical joke on one of his friends. Here the notion of conduct (that is prohibited by law) cannot be sensibly applied without regard to the mental state of the accused.

However, the teleological theory of conduct encounters insurmountable obstacles with regard to omission and negligence liability, as it is difficult to claim in these instances that the person acted in a goal-orientated way.[13] Thus this theory of action has also accordingly been widely rejected.

2.1.3. *The social theory of action: the context in which the act occurs is significant*

The social dimension of conduct is central to the so-called social theory of action. The doctrine in essence holds that criminal conduct needs to be interpreted in the social context in which it occurred. Meaning is not fixed; it is socially negotiated, so it is argued. It conceives conduct as a social rather than a natural phenomenon. Conduct is regarded as a part of a social pattern which determines its relevance for the attribution of criminal liability.[14] The movement of a hand can thus in one context be interpreted as a greeting and in another as a threat. Human conduct should not be understood as a pure ontological or self-existing causal or teleological process. It simply cannot be separated from its context and the social reality in which the subject acts. Conduct acquires meaning in relation to a concrete society and as part of a particular social system or subsystem. It goes without saying that attributing meaning to conduct can never be value neutral, as social and legal norms will play a prominent role. Thus, the social theory of action is both descriptive and normative in nature, combining ontological and normative criteria.[15]

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[12] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 243–248.

[13] See: E.-J. Lampe, 'Willensfreiheit und strafrechtliche Unrechtslehre' Zeitschrift für die gesamten Strafrechtwissenschaft (2006), pp. 11 et seq.

[14] E. Gritter, 'Functioneel plegen door een natuurlijke persoon', in van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), p. 14; J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), p. 161. See also: C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 248–250; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 38–39.

The emphasis on the social context of the conduct paves the way for the attribution of criminal liability without the involvement of physical movement, for instance to persons who have not physically committed a criminal offence but who are held responsible for the acts of another because they, due to a particular social rank, had control over the conduct of the actual offender and were thus in a position to prevent the criminal harm from occurring. Likewise, the doctrine allows the conduct of corporations to be perceived as relevant for the attribution of criminal liability. In our society organisations and social networks take a prominent role which materialises in 'new' concepts of criminal liability where the focus is no longer exclusively on the individual physical perpetrator, but also on factual responsible perpetrators behind the scene.[16] This is excellently portrayed by the Dutch doctrine of functional perpetration and the German doctrine of hegemony over the act which will be discussed in a subsequent chapter.[17] It is the social theory of conduct which nowadays prevails in the Dutch and the German penal systems.[18] And while in the English system lip service is still formally paid to the causal theory of action, in scholarly writing the inclusion of the social context in the evaluation of the actus reus seems to be gaining more and more acceptance.[19]

2.2. THE CONDUCT REQUIREMENT IN PRACTICE

As discussed above, criminal law ought to treat people as subjects, i.e. rational agents and therefore a criminally relevant conduct must reflect this agency.

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[15] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem §13 Mn 33–34.

[16] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 157–158. See: Chapters X and XI.

[17] See: Chapter X.

[18] F. De Jong, 'Tussen schuld en gedraging: normativering', in Kempen, et al. (eds.), De gedraging in beweging (Wolf Legal Publisher 2007), p. 66; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 153; J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), p. 161; E. Gritter, 'Functioneel plegen door een natuurlijke persoon', in van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), p. 14. See also: J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 40.

[19] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 59–61; W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), pp. 80–81; R.A. Duff, 'Answering for Crime' (Hart Publishing 2007), pp. 98 et seq.; R.A. Duff, 'Criminal Attempts' (Clarendon Press 1996), pp. 293 et seq.

This is a fundamental requirement, because unless a person has the capacity and fair opportunity to adjust his behaviour to the law its penalties ought not to be applied to him.[20] 'The movements of a person asleep, in a trance, suffering an epileptic seizure or responding reflexively are no more "actions" than the beating of one's heart or the motion of a falling tree'.[21] To treat people as subjects requires that criminal liability cannot be imposed unless the subject was responsible for the occurrence of the actus reus, i.e. unless its occurrence can be attributed to him. The conduct requirement thus reflects the underlying fundamental respect of the law for individual autonomy in relation to the imposition of criminal liability. As previously discussed, in order to be criminally responsible a person ought to possess certain capacities. On a fundamental level an ability to be aware of oneself as an agent is required. This arguably separates humans from most animals who lack any idea of themselves as actors. Furthermore, rationality as well as a capacity for self-reflection and evaluation is essential to human agency. Finally a capacity to control one's actions which includes a capacity to have done otherwise is considered vital for responsibility. If such capacities are absent or impaired, i.e. if the actor could not control his conduct, the imposition of criminal liability is unwarranted. We do not impose punishment in these situations for the same reasons, as we do not punish animals, minors or the insane.[22] What is missing in these cases is 'a vital link between mind and body'.[23]

In essence the core ingredients of a criminally relevant conduct are thus consciousness and control. These ingredients are also sometimes summarised in criminal law as the requirement of 'voluntariness'. It is often said that conduct ought to be voluntary for criminal liability to arise.

On a doctrinal level, the voluntariness requirement for conduct raises questions about whether this element is best conceived as part of the actus reus or rather as an element of mens rea.[24] While it is certainly possible to perceive voluntariness as a mental element, it is arguably best described as an essential constituent of conduct, which is part of the actus reus.

It is submitted here that as human conduct is generally thought to be goal-orientated, it does not seem odd to think that traces of mens rea can also be found in the concept of conduct. After all, the criminal relevance of many forms of conduct can arguably only be fully understood by knowing their underlying purpose.[25]

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[20] H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), p. 181.

[21] C. Finkelstein, 'Involuntary Crimes, Voluntarily Committed', in Shute and Simester (eds.), Criminal Law Theory: Doctrines of the General Part (Oxford University Press 2002), p. 143.

[22] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 104.

[23] H.L.A. Hart, 'Punishment and Responsibility' (Oxford University Press 2008), p. 107.

[24] See: D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 62 et seq. See also: A. Lynch, 'The mental element in the actus reus' The Law Quarterly Review (1982), pp. 109–142.

[25] See also: A. Lynch, 'The mental element in the actus reus' The Law Quarterly Review (1982), pp. 109–142.

Therefore, voluntariness seems best understood as part and parcel of the theory of conduct, and a denial of voluntariness thus has the result that the actus reus element cannot be established. On this view, the establishment of criminal liability accordingly already fails during the first evaluative step or question, i.e. was there criminally relevant conduct?

In addition, regardless of which conceptualisation one finds more apt, it does in any case seem clear that voluntariness of conduct is a more fundamental element of criminal liability than what we normally associate with mens rea issues stricto sensu, such as the intention to cause, or foresight of, the results of the act and awareness of circumstances.

Voluntariness (i.e. deliberate control) can in practice arguably be lost or impaired in two ways. First, the person's capacity to reason and control his behaviour can be disabled by impaired consciousness. Second, the person's capacity to reason might be intact but due to some external events he may have lost the physical control over the movements of the body.[26] If this is the case, the harm that occurs cannot be described as springing from human agency but is rather conceived as an accident, i.e. a natural event.

2.2.1. *Loss of physical control*

All penal systems agree that conduct in which there is no voluntary control cannot qualify as criminally relevant conduct. This excludes conduct from the realm of criminal law in which a person is for instance used as an instrument or cannot control his or her actions due to the absence of consciousness. Under this category fall for instance cases of *vis absoluta*. Suppose for instance that Rob is pushed by Peter from a diving platform and consequently lands on Carl who is severely injured. In this case Rob would not be held responsible for injuring Carl as he did not will the harmful conduct (*vis absoluta*).[27] Further actions which do not reflect deliberate control over the conduct are reflexes, for instance if Rob drops a glass after being stung by a bee, or kicks his doctor during an examination of his knee-jerk reflex. Moreover, spasms do not qualify as criminally relevant conduct. The paralysed person who kicks his therapist due to spasms or the patient who punches a nurse during an epileptic fit can neither control nor will their actions and can accordingly not be held responsible for them. Finally the conduct of unconscious or sleeping persons cannot trigger criminal liability.

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[26] See also: W. Wilson, et al., 'Violence, Sleepwalking and the Criminal Law: Part 2: The legal aspects' Criminal Law Review (2005), pp. 615–616; A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 109.

[27] The criminal law would rather turn to Peter in this circumstances who used Rob as an 'instrument'. See also: J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 156; J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), pp. 162–16; A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 109; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 42; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 266–271.

The current state of affairs in all three penal systems was nicely summarised by Lord Justice Denning in the English case of *Bratty v Attorney General for Northern Ireland* in which the defendant's claim of involuntary conduct was rejected by the jury as well as by the House of Lords:

> **Bratty Appellant v Attorney-General for Northern Ireland, House of Lords [1963] AC 386**
>
> 'On May 4, 1961, the appellant, George Bratty, was convicted at the Downpatrick Assizes before McVeigh J. of the murder of Josephine Fitzsimmons on December 22, 1960.
>
> The following summary of evidence given at the trial is taken from the opinion of the Lord Chancellor: Josephine Fitzsimmons, who was 18 years old, lived with her widowed mother near Hillsborough [Co. Down] in the Monument Road – a road which had been described as lonely and quiet. Her mother had a cousin, Miss Morrow, who resided with her brother at 44, Irwin Place, Donacloney, a village six or seven miles from Hillsborough. With them there lived the appellant George Bratty, a young man of about 26. [...]
>
> [The victim had asked the defendant to drive her into Hillsborough to deliver a message and get some sweets.]
>
> She was seen in Hillsborough but neither she nor the appellant reached her home again. At 11.15 p.m. her dead body was found in Grove Road on the grass verge. She had been strangled by a stocking from her left leg. She had not been sexually assaulted but her underpants had been removed and were found with her left boot a short distance from the body on the grass verge. The appellant [...] drove his car in the direction of Donacloney. When some two or three miles from Donacloney the car broke down and was left at the side of the road, an offer of a tow having been refused. He arrived at Donacloney on foot about 4 a.m. He was found by the police nearly an hour later in a garage at the bottom of the Morrows' garden and taken to the police station.
>
> Shortly after 1 p.m. on December 23, the appellant was seen by Detective-Head-Constable Russell, Dr. Howard of the Forensic Science Laboratory being present. Russell asked what was the cause of two scratches on his neck. The appellant said: "It was a young girl did it." He was then cautioned and made the following statement: "Something terrible came over me. [...] I had some terrible feeling and then a sort of a blackness. Just with that I took one look at her, caught her, threw her right over the back of the seat into the back. I caught her with my two hands. When I caught her with my two hands I took one of her stockings and put it round her neck. I tightened the stocking. Afterwards I went down the road a piece – down the road to the left of her house – took her out of the car and left her on the side of the road. Drove on towards home. I didn't mean to do what really happened.

> Many times I took her down to Hillsborough at week ends and nothing like that ever happened until last night. I apologise for what happened. I don't think it would have happened only that terrible feeling came over me at the time. I don't know really what caused it at all. I think that's about all I can say."
>
> […]
>
> LORD DENNING.
>
> My Lords, in the case of *Woolmington v. Director of Public Prosecutions* Viscount Sankey L.C. said that "when dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused." The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context – some people nowadays prefer to speak of it as "automatism" – means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking. […] The term "involuntary act" is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence to him to say "I don't know what happened. I cannot remember a thing," see *Hill v. Baxter.* Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time, see *Russell v. H.M. Advocate*; *Reg. v. Podola.* Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but he could not resist it, then his assertion "I couldn't help myself" is no defence in itself, see *Attorney-General for South Australia v. Brown*: though it may go towards a defence of diminished responsibility, in places where that defence is available, see *Reg. v. Byrne*: but it does not render his act involuntary so as to entitle him to an unqualified acquittal. Nor is an act to be regarded as an involuntary act simply because it is unintentional or its consequences are unforeseen. When a man is charged with dangerous driving, it is no defence for him to say, however truly, "I did not mean to drive dangerously." There is said to be an absolute prohibition against that offence, whether he had a guilty ***410*** mind or not, see *Hill v. Baxter* by Lord Goddard C.J. But even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was an involuntary act in the sense that he was unconscious at the time and did not know what he was doing, see *H.M. Advocate v. Ritchie, Reg. v. Minor and Cooper v. McKenna, Ex parte Cooper.*
>
> […]
>
> Appeal against conviction dismissed.'

2.2.2. *Impaired consciousness*

The aforementioned cases of loss of physical control all involve a complete loss of control over the movement of the body due to certain external or internal factors. However, while the essence of automatism certainly lies in the lack of capacity to control one's actions (or inactions) a complete loss of control does not always seem necessary to bar criminal liability. Yet to what degree consciousness/control ought to be impaired is open to debate and, as will become apparent, is often influenced by underlying policy reasons.

Difficult in this respect are cases which involve automated conduct like driving a car. Conduct like shifting gears, breaking and accelerating takes place almost unconsciously, but in these cases the person also generally remains in control over his conduct and moreover semi-skilled automated conduct arguably reflects the person as a rational agent. A pertinent example for such cases can be found in the German decision regarding a driver who lost control of his vehicle, crashing into another car, because a fly had flown into his eye. The court held that in such situations some form of willed control was involved in the conduct which therefore was deemed criminally relevant.[28] A comparable English case involving a form of impaired consciousness is *Attorney-General's Reference (No. 2 of 1992)*, where it was held that the condition known as 'driving without awareness', a trance-like state caused by long journeys on straight, flat, featureless motorways, in which the focal point of forward vision gradually comes nearer and nearer until the driver is focusing just ahead of his windscreen, could not support a defence of automatism because the driver nevertheless retained some control.[29] Thus, a driver will only be able to escape liability if his actions at the relevant time were *wholly beyond his control*, the most obvious case being sudden unconsciousness. If however he retains some, albeit imperfect, control, and his driving, judged objectively, was below the required standard, he remains liable. The threshold in law, led by policy considerations, to accept that no criminally relevant conduct occurred in driving cases is thus rather high.[30]

2.2.3. *The pitfalls of the conduct requirement*

As can already be deduced from the aforementioned case law, courts sometimes struggle to strike a fair balance between the need for public protection and fairness to the individual who lacked voluntary control over his actions. The courts are well aware that lack of (voluntary) control is relatively easy to assert and as it amounts to a denial of the actus reus element might result in a complete acquittal no matter how serious the charge.

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[28] 16 July 1974 OLG Hamm NJW 1975, 657.

[29] Attorney-General's Reference (No. 2 of 1992) [1993] 4 All ER 683.

[30] In England courts have in relation to other offences sometimes adopted a less stringent approach. See for instance: R v Quick [1973] 2 All ER 347, where the defendant was allowed to raise the defence of automatism on a charge of assault which had been committed in an onset triggered by hypoglycaemia notwithstanding the fact that the defendants condition was one of 'mere' semi-consciousness.

Difficulties can for instance arise in cases of temporary impaired consciousness, as for instance with regard to acts done by a person suffering from a mental illness short of insanity (e.g. stress psychosis or post-traumatic stress disorder).[31] Consider for instance the case of a young woman who, having been raped some days before, allegedly in a psychogenic, dissociative fugue commits an armed robbery.[32] These cases are difficult because the person in question may objectively seem conscious and in control of his/her actions, but the conduct may nevertheless be out of character and cast doubt on the general assumption that the offender acted with conscious mind or will.

One advances even further into the grey areas of the conduct requirement if one considers crimes committed while sleepwalking. A well-known example in this context can be found in the Canadian case of *R v Parks*.[33] In the small hours of the morning of 24 May 1987, 23-year-old Kenneth Parks, who at the time faced financial and personal problems as a result of his gambling habit, arose from bed, drove 23 km to the house of his parents-in-law and attacked them with a kitchen knife while both were asleep in bed, killing his mother-in-law and seriously injuring his father-in-law. Immediately afterwards he drove to a police station and reported the incident. Mr Parks was indicted for murder, but acquitted on all counts. The court, relying on expert witnesses and circumstantial evidence, held that Mr Park had been sleepwalking for the whole incident and could therefore not be held responsible for the killings. In fact, it was established that sleepwalking ran in Mr Park's family and that despite his gambling problems he always had an excellent relationship with his parents-in-law. They were aware of his situation and always supported him. His relationship to his mother-in-law was particularly good, and she used to refer to him as the 'gentle giant'. This case not only demonstrates the far-reaching implications that denial of voluntary conduct may have but also highlights some fundamental questions as to what it really means to act consciously and to exert control over one's conduct. Clearly Mr Parks had some control over his conduct; otherwise he would not have been able to drive 23 km to the house of his parents-in-law. However, this rudimentary control seems to have been insufficient to ground criminal liability for murder. His conduct was arguably not considered an expression of his practical, rational agency.

Be that as it may, complex issues can, finally, arise in cases where the loss of deliberate control occurred due to the prior disregard of diligent standards or is self-induced. An instructive case here is the English decision of *R v Lipman*.[34] The defendant in this case had taken a considerable amount of LSD and believed he was fighting snakes and descending to the centre of the world, whereas he was actually suffocating his girlfriend. The court refused the application of the automatism defence on the ground that first and foremost the automatism was self-induced and moreover induced by the defendant's own fault.

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[31] See for instance: R v Bell [1984] 3 All ER 842 and R v T [1990] Crim LR 256.

[32] R v T [1990] Crim LR 256.

[33] R v Parks [1992] 2 SCR 871.

[34] R v Lipman [1970] 1 QB 152.

In Germany, it is a controversial question whether acts of senselessly intoxicated persons can qualify as criminally relevant conduct.[35] If the person's capacity was completely removed by the intoxication, it is generally thought that no criminally relevant conduct occurred.[36] It should however be noted that German law provides for a specific offence for people who commit crimes while seriously intoxicated, for which they could otherwise not be punished.[37]

Similarly to English law, in the Netherlands the doctrine of *culpa in causa* is also applied in such cases.[38] Thus, it is important to note that in these cases liability will not be barred completely. Courts will then frequently select an earlier conduct as the founding element for the imposition of criminal liability, applying a *culpa in causa*, or prior fault reasoning respectively. This approach has mainly, but not exclusively, had a significant influence in various traffic offences. This is for instance the case where the driver of a vehicle falls asleep and then causes an accident, where liability is then often based on the driver's failure to stop when feeling drowsy.[39]

2.3. CONCLUDING REMARKS REGARDING THE CONDUCT REQUIREMENT

The foregoing discussion has revealed that a strict demarcation of criminally relevant or irrelevant conduct will not be always possible. Rather, grey areas will always remain, as the degree of consciousness or deliberate control can be gradually reduced, until one reaches a stage where the conduct can no longer be seen as an expression of human agency. When this will be the case, however, will also co-depend on medical and scientific evaluations and insights. Normative considerations might often play a role here as well. However, leaving grey areas aside, the key ingredients of the conduct requirement seem to be consciousness and control, which make the conduct a reflection of (human) agency. The conduct requirement fulfils an important function in criminal law as it helps to ensure that mere thoughts, feelings and attitudes cannot trigger the state's most fearsome power. Thus, it functions as a minimum threshold for criminal liability by generally requiring that the defendants' liability be based on some form of externalised conduct.

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[35] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 40.

[36] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem §13 Mn 39. See also: B. Fischer and J. Rehm, 'Alcohol consumption and the liability of offenders in the German criminal system' Contemporary Drug Problems (1996), pp. 707–729.

[37] See: §323 a GCC. See: Chapter VIII, section 8.

[38] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 349–351.

[39] See for instance the English case of Kay v Butterworth [1945] 173 LT 191, where it was held that a driver could be held responsible for his antecedent failure to stop driving when he felt drowsy. For an almost identical ruling in Germany see: 18 November 1969 BGH NJW 1970, 520. See also: 17 November 1994 BGH NJW 1995, 795 where an epileptic was found guilty of negligently causing bodily harm, as he drove despite being aware of his condition.

3. OMISSION LIABILITY

3.1. INTRODUCTION

Having analysed the theory of action it is now possible to proceed to discuss the second manifestation of human conduct. At first sight it can seem odd to impose criminal liability on people for failures to act, as the number of things we do not do every day far exceeds the number of things we actively do. While reading a book, I for instance do not help all the people sleeping rough in Amsterdam, Berlin or London. This potentially extremely broad scope of liability may arguably be one of the reasons why courts and academics have often approached omission liability with profound scepticism. Furthermore, the legal concept of actus reus, suggestive as it is of action rather than inaction, may be responsible for the erroneous belief that there is something untoward about imposing criminal liability for omissions. However, as will subsequently become apparent, recent developments seem to suggest that modern criminal law increasingly accepts and incorporates omissions and duties of care into the framework of criminal liability.

Criminal liability for omissions can usually arise in two forms. First, a statute can explicitly impose liability for omitting to do something. These offences are defined in terms of a failure to act and impose a duty of care (such as the duty to report an accident to the police) on the citizens. Second, there are instances where offences, defined in terms of positive acts, like killing, burning or assaulting, can be committed by people who remain idle and let events run their course. Almost all European penal systems distinguish between these two manifestations of omissions. In England a distinction is made between offences of mere omission and offences of omission causing a result.[40] By the same token the Netherlands[41] and Germany[42] distinguish between proper and improper crimes of omission.

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[40] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 72–74.

[41] *Eigenlijke en oneigenlijke omissiedelicten*. See for instance: J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 78.

[42] *Echte und unechte Unterlassungsdelikte*. See for instance: H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), pp. 605–608.

3.2. STATUTORY DUTIES OF CARE (OR PROPER CRIMES OF OMISSION)

More and more duties of care are nowadays introduced by statutes. National legislators are increasingly inclined to impose duties to act in modern welfare or regulation offences where offences of failure to report or failure to comply with other requirements have become quite common.[43] Especially in the industry, commerce and business context, general standards of diligence become more and more important, in order to circumscribe and prevent possible risks to the public. In many instances these diligence standards are nowadays enforced by means of proper crimes of omission. The well-known duties imposed on motorists to take a breathalyser test or in the event of an accident to stop, report the accident and provide information or documents can for instance be mentioned here.[44] Yet outside the regulatory context an increase in omission liability also seems to be discernible. Consider for instance sections 19 and 38B of the English Terrorism Act 2000 and §138 (2) GCC which penalise a failure to bring a planned terrorist offence to the attention of the authorities.[45] Likewise, general duties to report apply now to the financial sector in order to prevent and combat money laundering.[46]

The paradigm of statutory omission offences can however probably be found in so called 'good Samaritan' or 'easy rescue statutes'. Article 450 DCC imposes punishment for the failure to take steps that one could take without danger to himself to save another from death.[47] The German counterpart, §323c GCC, has a slightly broader scope, as it also imposes liability for the failure to render assistance in cases where no mortal danger for the victim is imminent.[48] These offences impose punishment for a failure to render aid or assistance but are not designed to impose liability for the death or bodily harm of the person in distress due to the failure to aid. This peculiarity explains why these offences generally only impose light sentences (up to three months' imprisonment in the Netherlands and up to one year in Germany). The wrong lies in the failure to carry out the generic duty to help fellow citizens in need rather than in a failure to prevent death or serious injury.

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[43] Generally see: Law Commission Consultation Paper No 195, 'Criminal liability in regulatory contexts' (2010), pp. 9, 82 et seq. See also: section 111A(1)(c) Social Security Fraud Act 2001, making dishonestly failing to report a change of circumstances a criminal offence. Compare also: section 96 (11A) of the Transport Act 1968.

[44] See: sections 6 and 170(4) of the Road Traffic Act 1988; §142 GCC which criminalises leaving the scene of an accident without cause and Article 163 of the Dutch Road Traffic Act 1994.

[45] Note however that the general scope of §138 GCC introduces a general duty to report planned serious offences of which one is aware to the authorities. See also: Article 135 DCC which also imposes a duty to report planned serious offence of which one has knowledge to the police.

[46] See: sections 330 and 331 of the Proceeds of Crime Act 2002 as well as §11 of the German Money Laundering Act (*Geldwäschegesetz*). See also: A. Ashworth, 'Criminalising Omissions', in A. Ashworth (ed.), Positive Obligations in Criminal Law (Hart Publishing 2013), pp. 56–66.

[47] Article 450 DCC reads as follows: 'A person who witnesses the immediate mortal danger of another person and who fails to render or procure such aid and assistance as he is capable of rendering or procuring where there is no reasonable expectation of danger to himself or others is liable to a term of detention of not more than three months or a fine of the second category, where the death of the person in distress ensues.'

[48] §323 c GCC reads as follows: 'Whoever does not render assistance during accidents or common danger or need, although it is required and can be expected of him under the circumstances and, especially, is possible without substantial danger to himself and without

In England such an easy rescue provision is absent.[49] Drawing on the biblical good Samaritan parable, Lord Diplock for instance argued: 'The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal'.[50] However, the desirability and feasibility of creating such a statute has been hotly debated.[51] Critics in England have often argued that such an offence would be too general in nature, unnecessarily curtail the individual autonomy of citizens and would therefore be unnecessary and unworkable. It is however debateable whether such a strict individualistic approach is still acceptable in our modern interlinked society and, if not, whether some form of social responsibility to assist others should exist, particularly where there would be no danger to the rescuer.

3.3. COMMISSION BY OMISSION (OR IMPROPER CRIMES OF OMISSION)

The second manner in which duties of care can emerge in criminal law is by judicial interpretation. The majority of criminal offences are worded in terms of *positive actions*. Murder is for example often defined as the prohibition on intentionally killing another human being. However, there are situations conceivable in which also *failures to act* may amount to murder. Just consider the paradigmatic example of a mother who intentionally fails to feed her child, leading to starvation. In this situation the question thus arises as to under what circumstances the verb 'killing' can be *extended* to encompass also cases of 'letting die'. The scope of people failing to save the child may however be almost infinite. Everyone with some knowledge of the situation, such as for instance neighbours, friends, social workers or the child's general practitioner, also arguably fail to save the child and could therefore in theory incur liability. Evidently, however, this would cast the net of criminal liability much too wide.

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violation of other important duties, shall be punished with imprisonment for not more than one year or a fine.'

[49] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 88.

[50] Lord Diplock in R v Miller [1983] 2 AC 162, at 175.

[51] A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), 424–459, A. Ashworth and E. Steiner, 'Criminal omissions and public duties: the French experience' Legal Studies (1990), pp. 153–164.

The tricky question is thus where to draw the line. The doctrinal solution to this predicament was to punish omissions only if the actor was under a *legal duty of care*. The criminal law traditionally imposes negative duties (i.e. not to steal or kill) on everyone, but enforces positive duties (i.e. to render assistance, prevent a particular harm, etc.) only in regard to people with a special relationship to the victim, the source of danger, etc.[52] The notion of a duty of care ensures that only people connected to the harm by such a relationship of responsibility will be subject to criminal punishment for failures to act.[53] The duty of care requirement thus functions as a safeguard for individual freedom and autonomy, because were it not to exist, criminal law would severely encroach on our individual liberties by requiring us to prevent any harm known to us from occurring.[54]

Given its doctrinal significance it therefore seems pertinent to briefly discuss the concept of a duty of care before we turn to the general approach to offences of commission by omission adopted in England, Germany and the Netherlands and the different duty situations recognised by jurisprudence.

3.3.1. Duties of care in modern criminal law

A duty of care can loosely be defined as a generally formulated obligation, which can be enforced by means of criminal law, to avoid certain acts or omissions likely to cause harm to others.[55] Thus, duties of care usually oblige the citizens to observe a certain degree of diligence with regard to the interest protected by the respective law.[56] However, the duty of care concept is an elastic one, so that its scope and shape can be adapted to the individual case at hand. Due to their general nature, duties of care can be incorporated in a multitude of different crimes. To be sure, the paradigmatic case of duty of care provisions is the case of omission liability, but duties of care by definition are to be found in crimes of negligence and endangerment offences as well. In English law for instance duties of care are of particular importance in the realm of gross negligent manslaughter.

Recent developments show that duties of care have become increasingly popular tools in the context of criminal risk management.[57] Furthermore, in jurisprudence a trend towards accepting new duty situations or respectively extend the scope of existing duties also seems to be discernible.[58]

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[52] A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), p. 424.

[53] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 90. Note that the fault requirement, which must be present to make the omission blameworthy, and the concept of 'possibility to intervene' also circumscribe the scope of omission liability.

[54] I. Kugler, 'Two concepts of omission' Criminal Law Forum (2003), pp. 426–427. See also: A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), p. 429.

[55] M.J.C. Visser, 'Zorgplichtbepalingen in het Strafrecht' (Gouda Quint 2001), p. 4.

[56] M.J.C. Visser, 'Zorgplichtbepalingen in het Strafrecht' (Gouda Quint 2001), p. 4.

[57] D. Roef, 'Strafrechtelijke Verantwoordelijkheid in de Risicomaatschappij', in Vos and Calster (eds.), Risico en voorzorg in de rechtsmaatschappij (Intersentia 2004), p. 222.

One reason for this development is that social reality has become too complex and changes too rapidly to be regulated by specific provisions.[59] Duties of care are flexible and vague enough to cover a great variety of detrimental conduct by imposing a certain standard of care on the citizens. Duties of care constitute a powerful weapon in the armoury of the legislator regarding behaviour control, but carry the inherent danger that the attribution of criminal liability will be guided by hindsight bias, expediency, and considerations of social engineering. Furthermore, duties of care in general and omission liability in particular can cause frictions with the principle of legality and the rule of law. The principle of legality in essence holds that no person should be punished without prior legislative warning.[60] Omission liability can run into conflict with the principle of legality in several ways. First, it can be argued that citizens are not accustomed to the concept of duties of care, in contrast to prohibitions, and may therefore incur criminal liability for conduct which they deemed to be in accordance with the law. The argument gains more force if one takes into consideration, as already mentioned, that duties of care are frequently created by jurisprudence ex post, i.e. after the conduct in question has taken place.[61] This casuistic approach, however, can make it difficult to foresee what conduct the law expects from a citizen in a particular situation. Furthermore, as will also become apparent in the following discussion, the scope and content of duties to act is a permanent bone of contention in all penal systems, which can make it unclear for the citizens in certain situations what the law requires in order to avoid criminal liability.[62] However, while these arguments might carry some weight with regard to duties of care directed to everyone, they are less convincing with regard to duties directed to people in a certain (social) position. Such people are expected by society, due to their expertise, education, etc., to know and adhere to the diligence standards expected and required by a certain position.[63]

See also: J. Vogel, 'Norm und Pflicht bei den unechten Unterlassungsdelikten' (Duncker & Humblot 1993), p. 23.

[58] See for instance: R v Wacker [2002] EWCA Crim 1944, R v Willboughy [2004] EWCA Crim 3365 and R v Evans [2009] EWCA Crim 650. For a German decision in this context see: 17 July 2009, BGH NStZ 2009, 686, where it was established that a compliance officer had a duty to prevent fraudulent activities by the company.

[59] D. Roef, 'Strafrechtelijke Verantwoordelijkheid in de Risicomaatschappij', in Vos and Calster (eds.), Risico en voorzorg in de rechtsmaatschappij (Intersentia 2004), p. 223.

[60] See: Chapter III.

[61] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 9; H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), pp. 608–609.

[62] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 97.

[63] D. Roef, 'Strafrechtelijke Verantwoordelijkheid in de Risicomaatschappij', in Vos and Calster (eds.), Risico en voorzorg in de rechtsmaatschappij (Intersentia 2004), pp. 222–225.

3.3.2. Commission by omission: a short comparative overview

Before investigating the different duties of care a brief overview of the general approach adopted towards omission liability in England, the Netherlands and Germany will be provided first.

3.3.2.1. England

English courts have traditionally approached omission liability restrictively. Thus English criminal law adheres to the general principle that individuals can be held criminally liable for their actions but not for their omissions.[64] However, it is nowadays generally accepted that omissions can trigger criminal liability in circumstances where a general legal duty of care exists which outweighs the interests of individual autonomy. A manifestation of this restrictive approach is the fact that English courts have in relation to commission by omission adopted an interpretive approach, in the sense that they try to reconcile an omission with the terminology found in criminal provisions.[65] Beyond that interpretive approach, English courts add the requirement of a special legal duty and capacity to act to the elements of the crime in question.

In any case, due to the aforementioned interpretive approach adopted by the courts, some offences are regarded as non-susceptible of being fulfilled by omission because, as is argued, they specify a particular type of behaviour that is required.[66] Conversely the inference of omission is regarded as unproblematic for offences that encompass an unspecific behavioural element. This approach can sometimes lead to a fuzzy outcome. Courts have for instance long accepted that murder and manslaughter can be committed by omission. On the other hand, it has been held that assault or battery cannot be perpetrated by omission. An assault, so the argument goes, requires an act; consequently, being entirely passive cannot constitute an assault.[67]

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[64] V. Tadros, 'Criminal Responsibility' (Oxford University Press 2005), p. 183.

[65] M. Duttwiler, 'Liability for omission in International Criminal Law' International Criminal Law Review (2006), p. 30; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 99–100.

[66] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 74.

[67] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 74–76. However, there is some dispute as to whether assault can be committed by omission. It seems that liability for an assault by omission can ensue from the doctrine of creation of a dangerous situation (*Ingernez*). See: D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 75–77. See also: DPP v Santana Bermudez [2003] EWHC 2908 (Admin).

3.3.2.2. The Netherlands

In the Netherlands it is accepted that criminal liability can also arise from a failure to act. In order for liability for omission to arise, it is generally required that the person in question had a general duty of care for the underlying legally protected interest and the capacity to do so.[68] The sources of these duties of care are, however, diverse and the scope of the duties is not always clearly established.

Nevertheless, in the Netherlands, the concept of omissions is well-established and not the cause of much controversy. This can *inter alia* be explained by the flexible act requirement applied in the Netherlands. The shift towards a more social concept of criminal conduct has led to a better incorporation of omissions in the framework of criminal liability. Furthermore, the acknowledgment that human conduct often consists of an aggregate of actions and omissions has presumably contributed to the acceptance of criminal liability for omission in the Netherlands.

3.3.2.3. Germany

To remedy some of the legality objections discussed above, and contrary to the Netherlands and England, the German legislator has enshrined the concept of improper crimes of omission in §13 GCC.[69] The wording of §13 GCC makes it clear that just like in the Dutch and English legal system, criminal liability for an omission derives from a duty to act, which in Germany is, according to the prevalent view, subdivided again into the duty of care (*Garantenstellung*) and the scope of this duty (*Garantenpflicht*). As in all three countries these duties are brought into existence by way of judicial decision.

To categorise the legal duties to act, German criminal law resorts to the notion of the guarantor (*Garant*). A person is generally regarded as a guarantor if he or she has a duty to safeguard any protected interests against dangers which are under his/her control (position of supervisor, *Sicherungsgarant*),[70] or in cases where because of a duty of care (*Obhutsverhältnis*) (s)he is obliged to protect a legally protected interest against harm (position of protector, *Obhutsgarant*).[71]

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[68] J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), p. 166.

[69] §13 GCC reads as follows:
'(1) Whoever fails to prevent a result which is an element of a criminal offense is punishable under this law only if he was under a legal duty to prevent the result, and the omission is equivalent to the realisation of the statutory elements of the crime through action.
(2) The punishment may be mitigated pursuant to §49 (1).'

[70] The category of supervision can again be subdivided into duties to control potential dangers posed by third parties or by things.

[71] M. Duttwiler, 'Liability for omission in International Criminal Law' International Criminal Law Review (2006), pp. 35 et seq., J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 309.

In other words the supervisor is held responsible for a particular source of potential danger, while the protector has a duty of care for a particular legally protected interest. This categorisation may help to better pigeon-hole certain scenarios conceptually but unfortunately offers little new insight into the uncertain scope and origins of individual duties.[72]

3.3.3. *The different categories of duties of care*

It is now time to dwell on the different categories of duties of care. The duties to be found in England, Germany and the Netherlands are manifold and differ in terminology. Nevertheless they can, with regard to their content, be summarised in the following way.

3.3.3.1. Duties based on a special relationship to the victim

There are a multitude of conceivable relationships which might give rise to a duty, ranging from family, domestic to business or economic relationships. These can be on a continuum representing the (moral) strength of an obligation to act, ranging from parent–children and matrimonial relationships to the (business) relationship between landlord and lodger. The roots of these duties can be diverse and, to some extent, reflect a society's attitude towards particular, institutionalised relationships at a particular time.

It is well-established that parents have a duty of care to protect their children[73] from harm and the same applies with regard to spouses.[74] Parents are under a duty to supply their children with adequate food and health care,[75] and, furthermore, they owe a legal duty to rescue their children[76] or are obliged to provide adequate medical aid.[77] Moreover, the parental duty does cover situations where one parent fails to prevent the abuse[78] or death of the child by another.[79] In a pertinent Dutch case for instance, a mother was convicted as being an accessory in the assault of her three-year-old daughter by the mother's boyfriend. The court ruled that because the woman had not taken appropriate measures to prevent the boyfriend abusing the child, nor intervened to stop the abuse, she could be held liable. The court held that the mother had a duty to care for the life, safety, health and well-being of her child which would have obliged her to take measures to prevent the abuse by her boyfriend.[80] As parents play a vital role in the socialisation process of their children, society accordingly has high expectations of parents to safeguard this process and to integrate the child as a valuable member of society. These high expectations have been forged into a strong duty of care, which arguably has its origins in the relationship of dependence prevalent between infant child and parent.[81]

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[72] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 41.

[73] See for instance: Children and Young Person Act 1933, R v Handley [1874] Cox CC 79 cited in A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 69, R v Sheppard and Another [1981] AC 394, R v Gibbins and Proctor [1919] 13 Cr App R 134.

[74] See: R v Hood [2003] EWCA Crim 2772; 24 July 2003 BGH NStZ 2004, 30.

[75] See: Children and Young Persons Act 1933. In Germany the parent's duty to care for their children is frequently derived from civil law. It is generally accepted that parents derive a duty to care for their children from several provisions of the civil code. Thus, parents generally owe a legal duty to rescue their children, or are obliged to provide adequate medical help.

[76] R v Handley [1874] Cox CC 79 cited in A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 69. For Germany see: H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 622.

[77] R v Sheppard and Another [1981] AC 394. For Germany see: H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 622 and 13 July 2007 BGH NStZ 2007, 402.

A pertinent case regarding the parent's duty to protect the life and well-being of their children can be found in the English case of *Gibbins and Proctor.*

R v Walter Gibbins and Edith Rose Proctor (1919) 13 Cr App R 134

> 'Darling J.:
>
> The two appellants were indicted and tried together for the wilful murder of Nelly Gibbins, the daughter of Gibbins. The facts were that Gibbins's wife had left him, and he was living in adultery with Proctor. There were several children, one of whom was the child of Proctor, in the house. He earned good wages, which he brought home and gave to Proctor to maintain the house and those in it. There is no evidence that there was not enough to keep them all in health. And all were looked after except one, namely Nelly, who was starved to death. Her organs were healthy, and there was no reason why she should have died if she had been supplied with food. She was kept upstairs apart from the others, and there was evidence that Proctor hated her and cursed her, from which the jury could infer that she had a very strong interest in her death.
>
> [...]
>
> It has been said that there ought not to have been a finding of guilty of murder against Gibbins. The Court agrees that the evidence was less against Gibbins than Proctor, Gibbins gave her money, and as far as we can see it was sufficient to provide

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[78] See: R v Emery [1993] 14 Cr App R (S) 394. See also: 20 December 1983 BGH NStZ 1984, 164, where a mother was convicted as an accessory to the sexual abuse of her two daughters by their step father, as she had omitted to report the abuse to the police.

[79] See: section 5 of the Domestic Violence, Crime and Victims Act 2004 as amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012 imposes liability on members of the same household for failing to prevent abuse of a child or vulnerable adult by another. Compare also: Kühl, 'Die strafrechtliche Garantenstellung – Eine Einführung mit Hinweisen zur Vertiefung' JuS (2007), p. 501.

[80] Hof 's-Gravenhage, 9 August 1988, NJ 1988, 979.

[81] A. Ashworth, 'Criminalising Omissions', in A. Ashworth (ed.), Positive Obligations in Criminal Law (Hart Publishing 2013), p. 46.

> for the wants of themselves and all the children. But he lived in the house and the child was his own, a little girl of seven, and he grossly neglected the child. He must have known what her condition was if he saw her, for she was little more than a skeleton. He is in this dilemma; if he did not see her the jury might well infer that he did not care if she died; if he did he must have known what was going on. [...] It is unnecessary to say more than that there was evidence that Gibbins did desire that grievous bodily harm should be done to the child; he did not interfere in what was being done, and he comes within the definition which I have read, and is therefore guilty of murder.
>
> The case of Proctor is plainer. She had charge of the child. She was under no obligation to do so or to live with Gibbins, but she did so, and receiving money, as it is admitted she did, for the purpose of supplying food, her duty was to see that the child was properly fed and looked after, and to see that she had medical attention if necessary. [...] ["]The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty." Here Proctor took upon herself the moral obligation of looking after the children; she was *de facto*, though not *de jure*, the wife of Gibbins and had excluded the child's own mother. She neglected the child undoubtedly, and the evidence shews that as a result the child died. So a verdict of manslaughter at least was inevitable.
>
> But it is necessary to go further and see whether it was murder. The evidence is that she had plenty of money; that she kept the child upstairs insufficiently supplied with food; that she hated the child and hit her. There is also evidence that when the child died of starvation both appellants took part in hiding the body and preventing the death from being known. [...] The jury came to the conclusion that she had done more than wickedly neglect the child; she had deliberately withheld food from it, and therefore we come to the conclusion that there was evidence which justified the jury in returning a verdict against her, not merely of manslaughter, but of murder. The appeals are therefore dismissed.'

Spouses on the other hand in general owe a duty of care to each other in relation to dangers to life and limb.[82] A husband who omits to call for medical assistance for his ill partner in due time, or fails to rescue her from an imminent danger, might thus incur criminal liability. A pertinent example can be found in the following Dutch decision.

> **Court of First Instance Breda, 27 November 2006, ECLI:NL:RBBRE:2006:LJN AZ4427**
>
> '2. Indictment:
>
> [...]
>
> The prosecution [further] claims that the defendant between 11 March 2006 and 12 March 2006 in Breda intentionally left his wife [the victim] to whom he owed a

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[82] See: R v Hood [2003] EWCA Crim 2772; 24 July 2003 BGH NStZ 2004, 30.

> legal duty to support, care for and look after in a state of helplessness after she had fallen down the stairs of their common apartment. He violated his duty of care by failing to render aid and/or call for medical assistance by leaving the severely injured victim to her fate. His failure to act resulted in the death of the victim due to internal bleedings caused by a broken left arm, which she had sustained in the fall.
>
> […]
>
> 8.2. The Court considers the following with regard to the rendered evidence:
>
> The suspect in his testimony in court stated that on the 11th of March around 23.30 he discovered his wife lying unconsciously at the bottom of the stairs in his apartment. He immediately assumed that his wife had fallen down the stairs. After shaking (to awake) her as well as undressing her he poured some water over her. When his wife showed no reaction to his "treatment" he went back to bed. [Forensic evidence had estimated the time of death between 23.30 and 02.00h.]
>
> On the suspect, especially due to his knowledge of the generally frail health of his wife, rested a duty to take reasonable steps to provide or procure medical help for his partner. The suspect has neglected this duty of care completely.
>
> […]
>
> By leaving his wife in this utter state of helplessness the suspect has considerably increased the risk of death. This increase in the likelihood of death makes it possible to reasonably attribute the death of the victim to the suspect.
>
> 9. The aforementioned leads to the following conclusion:
>
> The suspect has violated Article 257 DCC (and is accordingly sentenced to a prison sentence of three years).'

Finally, other relationships can also give rise to a duty of care. A pertinent example can be found in scenarios where people jointly engage in a dangerous enterprise. In these cases the situation or activity itself often presupposes or even requires that the participants look out for each other. One can for instance think here of mountaineers, divers, people going on a joint wild water or canyoning trip or an expedition to the jungle, etc.

3.3.3.2. Undertaken duties

Under this category cases can be subsumed, where a person has voluntary assumed a responsibility or has undertaken a duty, but not fulfilled his 'obligation' which led to the occurrence of harm. One important decision in this context in English law is the case of *R v Stone and Dobinson*. In this case Mr Stone and his mistress Ms Dobinson, both elderly and not very competent, allowed the sister of Mr Stone (the victim) to live with them and gave her the use of a room. The victim was eccentric, suffered from anorexia nervosa and neglected herself. She avoided any contact with the other members of the household and spent days at a time confined to her room. She soon became immobilised and helplessly infirm. Both the man and the mistress were aware of the sister's deteriorating condition but failed to take any effective steps to summon help. The victim was eventually found dead in her bed from toxaemia caused by infected bed sores and prolonged immobilisation. The Court of Appeal upheld the conviction of Mr Stone and Ms Dobinson for reckless manslaughter by omission as they were found to have breached their duty of care towards the victim.[83]

In any case, one can however also think here of cases where the suspect has entered into a contract and a breach of this contract has caused harm to the victim.[84] In some penal systems, a contract per se may function as a basis for a duty to act. This duty may also encompass third parties. Often cited here is the case of a railway gate-keeper who failed to close the gate and a cart that subsequently passed through was struck by a train.[85] Thus, a contract is deemed a sufficient basis for a duty, regardless of to whom the contractual obligation is owed.[86]

In other penal systems, however, a contract in itself is not sufficiently strong to ground a duty to act. Only once responsibility has factually been assumed can criminal liability be imposed.[87] Yet, in the absence of a contract, factual assumption of responsibility can also be sufficient.[88] Such a factual assumption of responsibility could also occur in the form of a transfer of a duty from another person.[89]

A pertinent example for such duty situations can be found in the following German decision. In this case workers forgot to remove a steel claw from the railway tracks of the suspension railway in Wuppertal after having finished their regular maintenance work, which caused the derailing of the train. The accident caused the death of five passengers and left forty severely injured. The maintenance work on the railway took place during the night shift and teams of two workers were responsible for the maintenance work on designated sections of the track. The defendants A and B worked together on such a section. As time was scarce, the site manager ordered two other workers C and D to support A and B. They agreed to split the workload, two workers working on the left hand side and the other two working on the right hand side of the track. A and B removed the steel claw on their side of the track and mistakenly presumed that

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[83] R v Stone and Dobinson [1977] QB 354.

[84] A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), p. 443.

[85] R v Pittwood [1902] 19 TLR 37. H.D. Wolswijk, 'Strafbaar nalaten: een zorgplicht minder', in Harteveld, et al. (eds.), Systeem in Ontwikkeling. Liber amicorum G. Knigge (Wolf Legal Publisher 2005), p. 550.

[86] A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), p. 444.

[87] M. Duttwiler, 'Liability for omission in International Criminal Law' International Criminal Law Review (2006), p. 36. See also: 31 January 2002 BGH NStZ 2002, 421 at para 20 and 8 November 2000 BGH NJW 2001, 453, where the BGH held that in addition to a contractual relationship a strong relationship of mutual trust needs to be established for a duty of care to arise.

[88] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 43.

[89] See the German case: 31 January 2002 BGH NStZ 2002, 421.

C and D would do the same on their side. Regarding the workers' duty of care the German Supreme Court held the following:

> **German Supreme Court, 31 January 2002, NJW 2002, 1887**
>
> 'Their [i.e. the workers] duty of care was based on the factual assumption of responsibility by accepting the orders of their manager. The task at hand concerned the specific removal of an obvious and grave source of danger for the operation of the railway. The factual assumption of responsibility therefore grounds a duty of care for the safety of the railway passengers. [...] Decisive for the establishment of a duty of care is therefore only the factual assumption of responsibility rather than the duties flowing from their employment contract.
>
> [...]
>
> Furthermore, the fact that C and D assisted A and B in their work cannot lead to a cessation of A and B's position as a protector. It can however modify the scope of the duty of care. [...]
>
> However, given the high degree of risk involved for the train operation the defendants A and B would have at least been obliged to ascertain that C and D had effectively removed the claw.'
>
> [Accordingly, the three supervisors in charge of the maintenance work were convicted of negligent homicide for their failure to carry out the necessary checks, while the four workers were convicted of negligent homicide by nonfeasance – JK.]

3.3.3.3. Duties based on specific qualities of the offender

Many people, whether in the workplace or elsewhere, are subject to particular duties flowing from their social role/position.[90] Many of these duties will arise in relation to civil servants, who because of their social role are not only bestowed with certain powers but are also under a duty to fulfil their function diligently and properly. Consider for instance a policeman who lets a thief escape because he is a friend. The omission to arrest the thief constitutes a violation of the respective duty of care.[91]

Furthermore, a particular occupation which can also be categorised as the voluntary undertaking of a duty can form the basis of a duty.[92] For instance, different duties might apply to police officers, building contractors, foremen, managers or doctors. The standard of care required by this class of persons is usually considerably high. Taking into account their training and skill, they are deemed to react swiftly and diligently to prevent the occurrence of harm. Professional standards by which the conduct in question will be evaluated can therefore be of considerable importance. This becomes particularly evident with regard to patient–doctor relationships. This was outlined in the English case of *R v Adomako*, where an anaesthetist during an eye surgery failed to detect the disconnection of a tube from the ventilator which caused the death of the patient.[93] It was held that 'if a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, […] he owes a duty to the patient to use due caution in undertaking the treatment.'[94]

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[90] See for instance: 17 July 2009 BGH NStZ 2009, 686, 19 April 2000 BGH NStZ 2001, 188.

[91] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 44.

[92] See: 17 July 2009 BGH NStZ 2009, 686.

Such a standard of care seems to be applied to professional relationships in all penal systems. The conduct in question is thus to be judged by the standard of a reasonable competent person from the same profession. A good example of the difference in the standard of care required by professionals and other, less trained people can be found in the Dutch *Jomanda* cases. In 1999, the Dutch actress and comedian Sylvia Millecam was diagnosed with breast cancer. Although she visited several regular doctors, she chose to forego regular treatment and consulted physicians who were trained conventional doctors but also used alternative therapies. She also sought counsel from several paranormal and alternative healers, including the Dutch medium Jomanda. Her condition steadily worsened and she died two years after the initial diagnosis. Jomanda and two doctors who had, amongst others, used alternative treatment on the actress were prosecuted for her death. The court in Amsterdam convicted the two physicians for the death of the actress, as they had violated their duty of care. The court argued that they had not applied the diligence which was reasonably expected by a doctor, by inter alia not properly informing her about the possibilities and limits of the alternative treatment used and had not insisted that the actress continued conventional treatment.[95]

The alternative healer, Jomanda, was however acquitted by the court. Although the court thought that Jomanda had violated a duty of care by corroborating the actress's belief that she was not suffering from cancer, this violation was not the cause of the medical malpractice.[96] The prosecution appealed but the Dutch Supreme Court upheld the acquittal:

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[93] R v Adomako [1995] 1 AC 171.

[94] See also the Dutch case: HR 14 June 2005, ECLI:NL:HR:2005:AT1801 where a macrobiotic nutritionist was held responsible for the death of one of his patients who despite suffering from uterine cancer he had not advised to consult conventional medical assistance but had continued macrobiotic treatment. It was held that a duty of care rested on the nutritionist, which, according to the court, entailed that he should have shown less averseness to conventional medicine and had provided the victim with more information regarding the possibilities and impossibilities of macrobiotics, especially since he was aware of the fact that no scientific evidence existed that macrobiotics could encapsulate, let alone cure cancer.

[95] Rb. Amsterdam 12 June 2009, ECLI:NL:HR:RBAMS:2009:BI7370.

> **Dutch Supreme Court, 12 March 2013, NJ 2013, 424**
>
> '2.3.
> According to the considerations outlined under 2.2.2. above, the Court of Appeal has established that the suspect in her role as a "healing medium" indeed performed health/medical care services for S. Millecam [the victim] and that the relationship between the two was based on medical treatment, but that the suspect did not carry out a profession for which a registration pursuant to the Health Care Professions Act was required.
>
> [...]
>
> 2.5
>
> It is apparent from the judgment of the Court of Appeal that it was not convinced that the nature or content of the advice and support nor the manner in which they were rendered were in itself sufficient to negatively affect Millecam's health and/or made the care provided by medical professionals futile. This statement should be understood to mean that the advices and support rendered were not aimed to dissuade Millecam from seeking conventional medical assistance and that they in fact did not prevent her from seeing other medical professionals. For this reason it cannot be stated that the advice and support provided by the suspect unnecessarily harmed the victim's health and neither did she violate her obligations under civil law (Art 7:453 DCC). This verdict is based on (i) the fact that the suspect in her advice and support also made it clear that (in addition) conventional medical professionals ought to be consulted (an advice which Millecam followed) which makes it, leaving exceptional circumstances aside, unlikely that she grossly violated her duty of care. This can also be seen as a strong indication that the suspect did not accept the considerable chance to harm the victim's health and that (ii) the defendant's conduct did not significantly increase the risk of harm (as alleged in the indictment) so that the death of the victim cannot be reasonably attributed to here.
>
> This judgment (of the Court of Appeal) is in our view not incomprehensible.
>
> 2.6.
>
> Therefore the appeal is dismissed.'

An intriguing question is how the court would have decided here if only the medium Jomanda had been involved in the chain of events. The doctors' strong social position now leads to a break in the chain of causation, but would that be different if only Jomanda was involved after the initial diagnosis? In that case, the conviction of the medium arguably seems more likely.

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[96] Rb. Amsterdam 12 June 2009, ECLI:NL:RBAMS:2009:BI7445.

In conclusion it can be stated that duties based on specific qualities of the offender are strongly connected to his social role, education and skills, as well as to certain professional standards. A particular position or social role can thus give rise to a duty of care. The stringent amount of diligence required by these persons is warranted, given their special education and training, as well as the high amount of risk, mostly involved in the activities to be carried out by this category of persons.

3.3.3.4. Duties based on ownership of or responsibility for a source of danger

With regard to this subcategory the question arises as to whether a property owner, i.e. the owner of a car, house, etc., should have a corresponding duty to his property rights to prevent harm caused by his property. The paradigms of this subcategory can be found in the well-established duties of pet and car owners and of dangerous enterprises.[97]

Leaving paradigmatic cases aside, one possible route is to convict the property owner as an accomplice to the crime committed by the perpetrator in his presence or on his property.[98] Criminal liability is imposed when a person had *a right to control* the actions of another and (s)he deliberately refrains from exercising it. In these circumstances, inactivity may be regarded as encouragement to another to perform an illegal act, and therefore as aiding and abetting.[99]

The exact scope of this principle is, however, far from clear. Does the concept expand to all property owners, or is it confined to certain dangerous activities like driving a car?[100] Arguably, the responsibility for a source of danger can lead to the emergence of a duty of care. A home owner, occupant or landlord can thus be under a duty of care if due to particular circumstances protected legal interests are endangered in the spatial sphere of the lodging. This would give rise to a duty of care for an occupant to prevent the impairment of legally protected interests if special circumstances, such as a special personal relationship to the victim or the perpetrator, for instance, would require an intervention. An example of a duty arising out of responsibility for a source of danger can be found in the following German case concerning the liability of a caretaker of a school and a county construction supervisor for causing bodily harm by negligence. The school building in question had a flat roof which was accessible at ground level from one side of the building. The other side of the roof was equipped with an iron grating which had been installed forty years ago. The construction was structurally unsafe and its fastening was severely corroded. Three adolescents had climbed on the roof and leaned on the iron grating. The construction gave way and all three fell off the roof (3.5 m), resulting in considerable bodily injuries. The Court of First Instance had found that the two defendants had no case to answer but the Regional Court of Appeal quashed the decision and ordered a retrial, holding the following:

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[97] 27 July 1962 BGH NJW 1962, 2069, HR 17 March 1987, NJ 1987, 771, Dangerous Dog Act 1991.

[98] A. Ashworth, 'The scope of criminal liability for omissions' The Law Quarterly Review (1989), p. 446.

[99] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 220.

[100] See for instance: H. Otto, 'Grundkurs Strafrecht: Allgemeine Strafrechtslehre' (De Gruyter Recht 2004), p. 180 and 7 August 1981 OLG Stuttgart NJW 1981, 2369.

Regional Court Saarbrücken, 24 October 2005, NStZ-RR 2006, 75

> 'The reproach in this case is not linked to any positive action but rather to an omission pursuant to §13 GPC, namely a failure to regularly check the condition of the iron grating. […]
>
> For omission liability to arise it is necessary to establish whether the defendants were under a legal duty of care.
>
> […]
>
> Defendant J:
>
> As the caretaker of the school he, according to his own statement, was responsible for the maintenance of the building and obliged to remove any potential sources of danger. He thus had a legal duty to maintain safety. This duty also applies in the case at hand, despite the fact that the victims had accessed the roof unauthorized. […] He therefore had a duty to protect third parties, particularly pupils from any construction hazards. He has violated this duty by failing to sufficiently and regularly check the condition of the iron grating. This is even more so considering the considerable danger (for life and limb) created by the altitude difference of 3.5 meters.
>
> […]
>
> Furthermore, the poor condition of the grating could have been easily detected had regular checks taken place. Given this easy recognizability, it can be concluded that the defendant has breached the duty of care incumbent on him.
>
> Defendant N:
>
> The defendant functioned as the county construction supervisor. […] In his function he had a duty to maintain the safety of all the buildings falling within his sphere of responsibility. The fact that he had delegated this task for the school to the defendant J does not relive him of his duty pursuant to §13 GCC. […]
>
> According to the evidence presented to us there persists sufficient suspicion that the defendant has violated the duty of care incumbent on him by failing to exercise control concerning the maintenance of the iron grating.
>
> […]
>
> The consequences of their duty violations were foreseeable for both defendants. That lack of control and supervision concerning the maintenance of a 40-year-old grating, which was in addition structurally unsafe, could lead to a failure to detect edificial deficiencies and that this in turn might create a danger for life and limb of others also accords to general (life) experience.
>
> Considering all the above we find that there is sufficient suspicion for the defendants to have a case to answer and order the commencement of trial.'

3.3.3.5. Duties based on the creation of a dangerous situation

This source of duties to act is probably the best established source in all three of the countries investigated. It seems to be a generally accepted principle of law that one is under a duty to prevent harm caused by prior conduct which created a source of risk or danger. Presumably, a duty based on the creation of a dangerous situation flows from the general prohibition to cause harm to others (*neminem laede*). Who creates a risk of harm to another is under a duty to prevent the manifestation or at least minimise the effects of that harm. A pertinent example in this respect can be found in the English landmark decision of *R v Miller*.

Regina Respondent v Miller Appellant, House of Lords [1983] 2 AC 161

> 'The defendant, a vagrant, went to live in an unoccupied house. After returning there one night he lit a cigarette and lay down on a mattress in the room he was using. He fell asleep before he had finished the cigarette, and it dropped onto the mattress, setting it alight. He awoke later when the mattress was smouldering, but did nothing to extinguish it, and merely moved to another room. The house caught fire and damage to the value of £800 was caused. The defendant was charged with arson, contrary to section 1 (1) and (3) of the Criminal Damage Act 1971. On his appeal against conviction, the Court of Appeal dismissed the appeal and certified the following question of law: "Whether the actus reus of the offence of arson is present when a defendant accidentally starts a fire and thereafter, intending to destroy or damage property belonging to another or being reckless as to whether any such property will be destroyed or damaged, fails to take any steps to extinguish the fire or prevent damage to such property by that fire?"
>
> [...]
>
> Their Lordships took time for consideration. March 17. LORD DIPLOCK.
>
> [...]
>
> Let me take first the case of the person who has thrown away a lighted cigarette expecting it to go out harmlessly, but later becomes aware that, although he did not intend it to do so, it has, in the event, caused some inflammable material to smoulder and that unless the smouldering is extinguished promptly, an act that the person who dropped the cigarette could perform without danger to himself or difficulty, the inflammable material will be likely to burst into flames and damage some other person's property. The person who dropped the cigarette deliberately refrains from doing anything to extinguish the smouldering. His reason for so refraining is that he intends that the risk which his own act had originally created, though it was only subsequently that he became aware of this, should fructify in actual damage to that other person's property; and what he so intends, in fact occurs. There can be no sensible reason why he should not be guilty of arson. If he would be guilty of arson, having appreciated the risk of damage at the very moment of dropping the lighted cigarette, it would be quite irrational that he should *not* be guilty if he first appreciated the risk at some later point in time but when it was still possible for him to take steps to prevent or minimise the damage.
>
> [...]

> While in the general run of cases of destruction or damage to property belonging to another by fire (or other means) where the prosecution relies upon the recklessness of the accused, the direction recommended by this House in *Reg. v. Caldwell [1982] A.C. 341* is appropriate, in the exceptional case, (which is most likely to be one of arson and of which the instant appeal affords a striking example) where the accused is initially unaware that he has done an act that in fact sets in train events which, by the time the accused becomes aware of them, would make it obvious to anyone who troubled to give his mind to them that they present a risk that property belonging to another would be damaged, a suitable direction to the jury would be: that the accused is guilty of the offence under section 1 (1) of the Criminal Damage Act 1971 if, when he does become aware that the events in question have happened as a result of his own act, he does not try to prevent or reduce the risk of damage by his own efforts or if necessary by sending for help from the fire brigade, and the reason why he does not is either because he has not given any thought to the possibility of there being any such risk or because, having recognised that there was some risk involved, he has decided not to try to prevent or reduce it.
>
> So, while deprecating the use of the expression "actus reus" in the certified question, I would answer that question "Yes" and would dismiss the appeal.'

The *Miller* principle thus imposes a duty to counteract a danger that one has created. However, the failure to prevent the danger will not by itself be sufficient to trigger criminal liability. Furthermore, all the other elements of the offence, like mens rea, must be present. This qualification generally concentrates the main thrust of the principle on result crimes, requiring fault, where the preceding act was done without fault.[101]

As already mentioned, all penal systems recognise a duty of care based on the creation of a dangerous situation.[102] These duties are clearly an acknowledgment of the fact that people can set in motion a chain of events which would result in the occurrence of harm if they were not interrupted by some positive action.

4. CONCLUDING REMARKS

This chapter set out to discuss the two major manifestations of conduct relevant for the attribution of criminal liability. Generally a distinction is drawn between offences of commission and omission. Paradigmatically, criminal law prohibits the commission of certain acts, i.e. wrongdoing, such as killing, stealing, raping, causing damage to property, etc. Yet criminal justice systems also punish the culpable omission of an act expected of a person by law. The social reproach in such cases is precisely the failure to act, i.e. to intervene, provide help, etc., while such action would have legally been required. The common approach is that it is possible to convict for any action causing a prohibited criminal result, but not for every omission.[103] For the purpose of a conviction regarding failures to act, criminal law imposes the additional requirement of a violation of a duty to act. These duties can either be established by statutes or alternatively by judicial interpretation. While the duty concept can certainly be considered problematic for a variety of reasons, it nevertheless seems that its significance for the attribution of liability has increased over recent years. As certain areas of social life become more and more tightly regulated, the amount of diligence standards and duties seems to have increased in the slipstream of these developments. This also arguably puts the stark dichotomy between commission and omission into perspective.

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[101] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 81.

[102] R v Miller [1983] 1 All ER 978. J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 318–319; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), pp. 44–45; J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), pp. 166–168; HR 12 December 2000, NJ 2002, 516; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 759–778; C. Sowada, 'Die Garantenstellung aus vorangegangenem Tun (Ingerenz)' Jura (2003), pp. 236–246; 19 December 1997 BGH NJW 1998, 1568; 18 August 2009 BGH NStZ-RR 2009, 366; 21 December 2011 BGH HRRS 2012, Nr 333.

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[103] I. Kugler, 'Two concepts of omission' Criminal Law Forum (2003), p. 421.

CHAPTER VI
CAUSATION

Johannes KEILER

1. INTRODUCTION

When something goes wrong and a (criminal) harm occurs, we intuitively ask what has *caused* it and whether or not someone can be held responsible for it. The public response and debate following high profile disasters such as the explosion of the Deep Water Horizon oil rig in the Gulf of Mexico or the controversies surrounding the E. coli epidemic in Germany are fine examples of this way of thinking.

Causal reasoning, i.e. causation, is also of great practical importance. In everyday life our thinking is strongly causally influenced. Not only are our sciences to a large degree based on the notions of cause and effect, but more generally human learning processes are to a certain extent based on it. To cure a disease, for instance, physicians must know its cause, and in the course of time we have learned that iron will corrode when exposed to the elements.

In the realm of criminal law causation plays a crucial role in the attribution of criminal liability. Its essential task is to distinguish human causes from 'Acts of God', i.e. accidents. The doctrine of causation reflects the prevalent individualistic stance in our society that no one should be convicted for a consequence (s)he did not cause. As the criminal law perceives individuals to be responsible agents with the capacity to reason and to accordingly choose their acts and omissions, they should only be held responsible for the 'normal' consequences of their own behaviour. 'Respect for individual autonomy and responsibility for conduct and consequences go hand in hand'.[1] It follows that the doctrine constitutes an important threshold for the imposition of criminal liability and it has a safeguard as well as a crime control function. On the one hand it ought to prevent the imposition of criminal liability for harm for which the actor is not responsible; on the other hand it ought to ensure that people who have caused a certain result can be held responsible.

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[1] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 86 et seq.

2. THE FIELD OF APPLICATION OF CAUSATION

Usually criminal liability requires the offender to have harmed a certain protected legal interest.[2] The prescribed harm is generally enshrined in the actus reus and can vary from offence to offence. Some offences require a specific result to manifest, the most prominent examples being murder, manslaughter, arson, wounding, criminal damage, etc. Others, such as perjury or rape, do not require a specific result, but are consummated once the prohibited conduct has taken place. Accordingly, the former are often referred to as 'result crimes' and the latter as 'conduct crimes'. It is especially with regard to result crimes that the doctrine of causation is of utmost importance. It is there that a link between the offender's conduct and the result must be established in order for liability to be attributed. This is because the result prescribed in these offences can be brought about by human conduct as well as by natural events. Death, physical injury, destruction of property also frequently occurs in nature (just think of a hurricane which might be said to have caused all the aforementioned harms) and so we are faced with the particular problem to determine whether a certain result can be attributed to (human) conduct.

Causation can however also play a role with regard to endangerment offences or even some conduct crimes like theft, robbery, fraud, etc.[3] For instance, in many cases of fraud it will be necessary to prove that the financial loss that occurred was caused by the deception in question. Furthermore, the doctrine plays a role in relation to offences where the manifestation of a certain result triggers an aggravation of punishment.[4] A pertinent example can be found in Article 300(2) DCC where in cases where serious bodily harm is caused as a result of physical abuse criminal liability is aggravated.[5] Finally, the doctrine is of importance with regard to crimes of negligence, where the Public Prosecutor generally needs to prove that the violation of the duty of care by the defendant has caused the criminal harm.

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[2] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 59.

[3] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 74–75; W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 167; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 106; A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem §§13 Mn 71, 130.

[4] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 75–76, 179; D.H. De Jong and G. Knigge, 'Het materiële strafrecht' (Kluwer 2003), p. 73.

[5] Article 300 reads as follows:
'(1) Physical abuse is punishable by a term of imprisonment of not more than two years or a fine of the fourth category.
(2) Where serious bodily harm ensues as a result of the act, the offender is liable to a term of imprisonment of not more than four years or a fine of the fourth category.'

The establishment of a causal link can however be a daunting challenge at times. This is because an event can have more than one cause and a cause more than one effect.[6] The effect of one cause can moreover be the cause of a following event and so forth. For example, $C_1 \rightarrow E_1 = C_2 \rightarrow E_2 = C_3 \rightarrow E_3$, and so on.[7] Moreover, results need not always manifest immediately but can occur protractedly, which makes the identification of the relevant cause even more difficult.

Consider for instance the all too common example of a cyclist being killed in a road accident. Was the cause of his death the head injury, the driver's mistake, the black ice on the road or the shortage of funds that led to the local authority's not removing the ice in time?[8] All these factors could potentially be seen as causes of the cyclist's death, but in the logic of criminal law we fade out other causes and focus instead on (human) conduct which we can call the cause of a respective criminal harm. Thus out of the multitude of causes for the manifestation of a criminal event, we are only concerned with (human) conduct which has caused the prescribed result. The reason for this is that the law's underlying purpose to engage in causal evaluations is the proper attribution of blame or liability to an agent for a particular event. Humans, however, become involved in chains of events which do not always permit the imposition of criminal liability. Coincidences and abnormal contingencies can often occur after the individual conduct, which makes it impossible to qualify the harm as the actor's deed. In these cases we consider the causal linkage between the actor's conduct and the result to be broken and therefore consider it to be an accident or a natural event respectively.

3. APPROACHES TO CAUSATION

To be functional, a theory of causation must outline criteria to establish a link between specific conduct and a result in such a way that similar situations will be governed by a uniform rule.[9] The choices will thus vary depending on whether one perceives the doctrine as a legal or a metaphysical concept. If one considers causation a metaphysical concept, then one would probably reject the claim that another person's free and informed intervening act can break the chain of causation, or that the culpability of the defendant can affect the causal status of his actions.[10] This is because if one bases causation on a pre-legal notion of cause and effect and views it as an operative force, it seems clear that it cannot be affected by a person's intention. Furthermore, proponents of such an approach would generally doubt that causal relations suddenly break off with the intervention of some force rather than petering out over time and space.[11] Moreover, if one perceives causation as a metaphysical concept in the sense of an operative force then problems can arise in relation to liability for omissions. As omissions can hardly be seen as forces and thus ontologically speaking constitute a nothing, they cannot be seen as causes either, so the argument runs.

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[6] W. Nieboer, 'Schets materieel strafrecht' (Gouda Quint 1991), p. 89.

[7] W. Nieboer, 'Schets materieel strafrecht' (Gouda Quint 1991), p. 89.

[8] T. Honoré, 'Responsibility and fault' (Hart Publishing 1999), p. 3.

[9] P. Ryu, 'Causation in Criminal Law' University of Pennsylvania Law Review (1958), p. 786.

[10] M. Moore, 'The Metaphysics of Causal Intervention' California Law Review (2000), p. 848. See also: M. Moore, 'Causation and Responsibility' (Oxford University Press 2009).

To summarise, it can be stated that the cardinal question is essentially whether causal enquires in law are designed to uncover some basic truth about the nature of the world, or whether their purpose is rather to provide a just basis for the imposition of criminal liability.

3.1. THE *CONDITIO SINE QUA NON*

The baseline from which all penal systems in regard to the doctrine of causation depart is the '*conditio sine qua non*' or the 'but for' test.[12] The cause of an event is deemed to be the whole set of factors that played a role in the bringing about of an event. Every condition which cannot be eliminated from this set of factors without eliminating the result that occurred is regarded as a legal cause.[13] In other words, the conduct in question must have been an indispensable condition for the result.[14] A causal relationship cannot be assumed if the result would have also occurred without the respective conduct. This doctrine constitutes the lower limit of causation in criminal law. The 'but for' cause is often referred to as the factual cause or causation in fact and is based on the assumption that the notion of causality applied in natural science would apply in law as well.[15] However, it soon will become evident that the doctrine has some serious shortcomings.

First and foremost, the theory only on the surface appears to be a real scientific theory. In science the singling out of a cause usually leads to a hypothesis which has to be experimentally confirmed. In criminal law such a confirmation is not required, so that the evaluation effectively stops with the formulation of a hypothesis. In other words, the scientist's starting point is the lawyer's end point.[16]

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[11] M. Moore, 'The Metaphysics of Causal Intervention' California Law Review (2000), p. 828.

[12] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 90–94; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 35; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 61–64; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 180.

[13] J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), pp. 175–176.

[14] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 180.

[15] D.H. De Jong and G. Knigge, 'Het materiële strafrecht' (Kluwer 2003), p. 7; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 352.

Furthermore, the doctrine can be seen as under- and over-inclusive. Over-inclusive, because for many results a multitude of causal factors can be relevant if the crime is placed in a broader context. This often becomes painfully clear in relation to large-scale disasters. On 2 January 2006 the roof of the ice rink in Bad Reichenhall, Germany, collapsed after heavy snowfall in the region, killing 15 visitors and severely injuring others. The primary cause of the disaster could be seen in the large amounts of snow which had accumulated on the flat roof, but the investigations revealed that other factors had also played a crucial role, dating back to the construction of the building. The processed roof beams had been of insufficient quality and stability and had been installed without permission under building law. In addition, in 1977 a 2.3 ton ventilation system had been mounted on the roof, again without permission. Furthermore, the local authorities had since 2002 already been aware of the bad condition of the building but had turned a blind eye to the problem.[17] In these situations the *conditio sine qua non* fails, as it cannot be said with certainty that but for one factor the roof would not have collapsed.

The doctrine is further under-inclusive with regard to alternative sufficient causes. Consider the example of A and B, who independently of each other pour lethal doses of arsenic into C's glass. In these cases the *conditio sine qua non* test fails, as it cannot be said that but for A's actions C would be alive. Furthermore the test is a thought experiment which is based on and presupposes a certain degree of knowledge about the cause and effect of certain factors. Thus, the test depends largely on actual scientific knowledge which sometimes may not exist. To countermand the far flung results achieved by the *conditio sine qua non* other theories have emerged which have however also failed to achieve entirely satisfactory results.

3.2. THE THEORY OF PROXIMATE CAUSE

The essential task of causation doctrines is to choose, from among the multitude of causes of a specific event, the criminally relevant cause. The theory of proximate cause chooses the most proximate indispensable condition to be criminally relevant.[18] In other words the cause closest to the result will be deemed to be the one relevant for criminal law. Thus, the basic truth encapsulated in this concept is that causal forces can sometimes be superseded by new causes. The theory is, however, also haunted by serious shortcomings, as an exclusive focus on the most proximate cause can lead to unsatisfactory results in practice. Consider for instance cases where the victim of an assault subsequently dies in hospital due to negligent treatment by a nurse. The proximate cause theory would in these cases attribute the death of the victim to the conduct of the nurse and would acquit the original wrongdoer. It is obvious that this outcome will not always be satisfactory, especially if the wounds inflicted by the perpetrator were severe and the mistake of the nurse minor.

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[16] W. Nieboer, 'Schets materieel strafrecht' (Gouda Quint 1991), p. 93.

[17] S. Stübinger, 'Zurechnungsprobleme beim Zusammenwirken mehrerer fahrlässiger Taten' Zeitschrift für Internationale Strafrechtsdogmatik (2011), p. 604.

[18] J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), pp. 176–177, J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 181; C. Kelk, 'Studieboek materieel strafrecht' (Gouda Quint 2005), pp. 236–237.

3.3. THE THEORY OF ADEQUATE CAUSATION

Another theory which is sometimes invoked is the theory of adequate causation. It uses the *conditio sine qua non* as a starting point but subsequently further circumscribes its results. Loosely formulated, this theory holds that 'a condition is the adequate cause of a consequence if it has a tendency, according to human experience and in the ordinary course of events, to be followed by a consequence of this sort'.[19] According to this theory, the central aspect is whether the pertinent result was foreseeable in the case at hand.[20] This involves a judgment of probability which is based on general experience.[21] The theory thus enriches the concept of causality with normative criteria of attribution and is in reality not a theory of causation but rather a theory of objective attribution as it does not answer the question when a condition is to be seen as the cause of a result but which causal conditions are to be relevant for the attribution of liability.[22]

3.4. OTHER FACTORS BEARING ON CAUSATION

We have seen, that the *conditio sine qua non* or 'but for' test can give rise to an infinite number of causes. Moreover, a particular result can often be traced back to several causes, which raises the question of how one can, from myriad causes, single out the one suitable for the attribution of liability. The question thus arises as to whether or not other legal factors can also play a role in the assumption of a causal link.

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[19] H.L.A. Hart and T. Honoré, 'Causation in the Law' (Oxford University Press 1995), p. 470. See also: J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 69 et seq.; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 368–370; A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014) Vorbem §13 Mn 87/88.

[20] J. Remmelink, 'Inleiding tot de studie van het Nederlandse Strafrecht' (Gouda Quint 1995), pp. 178–181.

[21] C. Kelk, 'Studieboek materieel strafrecht' (Gouda Quint 2005), p. 238.

[22] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 369.

3.4.1. *The role of the underlying offence*

In establishing a causal link between a result and the offender's conduct, the underlying offence plays a crucial role. Criminal liability should be confined to the type of harm envisaged by the purpose of the rule or law violated. Imagine the example of a driver driving from Manchester to London. For most of his journey he exceeds the speed limit, but he slows down to the correct speed before he reaches London, where he is involved in an accident. If he had not been speeding he would not have arrived in London when he did and the accident would have been avoided. Should the driver be held responsible for the conduct? Arguably not. The driver's antecedent speeding was not causal for the accident. The risk of an accident would have been just as high had he arrived late. Briefly put, the harm must be within the risk. Thus, 'if it is negligent to hand a child a loaded gun, and the child drops the gun on his foot and injures it, the injury to the foot is not within the risk that made it negligent to hand the child the loaded gun'.[23]

3.4.2. *The role of criminal policy and blameworthiness*

Although the doctrine has traditionally be seen as an element of the actus reus, i.e. an objective theory, we will see that factors of mens rea can play a role in establishing a causal link as well. There seems to be a judicial disposition to ignore causal problems where an unforeseen or extraordinary event caused the nevertheless intended result. This is nicely reflected by the adage 'intended consequences are never too remote'. Furthermore, notions like foreseeability, which often play a role in the establishment of a causal link, introduce subjective elements into the evaluation process. This puts the distinction between actus reus and mens rea into perspective, but does not diminish the worth of the concepts as conceptual tools.

Moreover, considerations of penal policy can influence the causal evaluation process. If certain interests are considered particularly worthy of protection then courts are likely to exclude these factors from the evaluation process or view them as auxiliary to the result.

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[23] H.L.A. Hart and T. Honoré, 'Causation in the Law' (Oxford University Press 1985), p. lxiii.

4. CAUSALITY COMPARED

It has been attempted to demonstrate above that the *conditio sine qua non* leads to an excessive scope of liability. Consider the example of a murderer's ancestors. If it was not for their acts the murder would not have occurred. But is this really a valid conclusion? Should they really be blamed for their descendant's misdeeds? If one's imagination is vivid enough, using this line of argumentation one could even regard Adam and Eve as necessary conditions for the murder. This has prompted the development either of legal concepts of causation or of normative criteria which conceptually restrict the attribution of criminal liability for physically causal acts. While the penal systems of England and the Netherlands can be seen as examples of the former approach, the German legal thinking tends towards the latter and advocates a strict separation of causation in fact and causation in law (i.e. attribution).[24]

4.1. CONTRIBUTORY CAUSES

We have seen that a criminal harm will frequently not be the result of one single causal factor, but that often other conditions will have also contributed to the manifestation of the result. This raises the question of which quality or significance the offender's conduct in the causal chain should have in order to construe a causal link between conduct and result and allow the attribution of liability.

In the Netherlands the decisive criterion adopted by the courts to establish a causal link is 'reasonable attribution'. It has to be determined whether the result can be reasonably attributed to the offender's conduct.[25] By adopting the theory of reasonable attribution the Dutch penal system has abandoned the view that causality is a metaphysical concept and has adopted the view that the establishment of a causal link in criminal law entails a normative judgment. The emphasis in this respect is on the word 'reasonable'. After all, the attribution of a result has to be reasonable. It follows that for instance the attribution of insignificant or insubstantial causes would be unreasonable.

Such a normative judgment is, however, always highly influenced by the historic context and the particular circumstances of the case in which it is taken. Accordingly, the doctrine is highly casuistic and flexible. This grants enough room to the courts to adapt the evaluation to the needs of the case at hand. This has allowed courts to assume that the offender's conduct need not necessarily be the sole cause of the occurred result; other factors might contribute as well. This and the functioning of this legal approach to causation are nicely demonstrated by a case in which the defendants were charged with causing grievous bodily harm; i.e. a severe head trauma (Article 141 DCC), to the victim during a brawl in a pub. There were however some doubts in this case as to whether the injuries had been caused by the defendant or by the way the victim had subsequently been carried outside the pub by other customers. The Court of Appeal had acquitted the defendant because, in its view, a causal link could not be established beyond reasonable doubt. This decision was appealed by the Public Prosecutor. The Supreme Court summarised the findings in the acquittal first and subsequently overruled the Court of Appeal. It held:

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[24] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 45.

[25] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 182 et seq.

> **Dutch Supreme Court, 28 November 2006, NJ 2007, 49**
>
> '3.3. It has been proven that: the defendant on 10 January 2004 in 's-Gravenhage together with others in a public location, namely the "t'Elfje" pub, publicly and in association with others assaulted R.T. by punching and stomping on the victim's face.
>
> 3.4. In regard to the acquittal from the first charge insofar as Article 141 relates to aggravating circumstances, the Court of Appeal has argued the following way: In the opinion of the Court [of Appeal] the aggravating circumstances enshrined in Article 141 could not be established beyond reasonable doubt because the possibility cannot be excluded, that the bodily injuries with which the defendant has been charged were partially also brought about by the manner how the victim had been dragged outside the pub by third parties. This means by dragging the victim outside by his arms and legs while lying on his back, especially via the steps of the entrance to the bar. [...]
>
> 3.5. It first and foremost has to be mentioned that to answer the question whether or not a causal link exists between the offender's (and his partners) violent conduct and the injuries that occurred [... this] has to be determined by utilizing the criterion of whether the injuries can reasonably, as a result of the violent conduct, be attributed to the defendant and his partners.
>
> The opinion of the Court of Appeal that a causal link cannot be established as it cannot be ruled out that subsequent conduct of third parties partially caused the injuries shows a failure to correctly apply the said criterion. As far as the appeal of the Public Prosecutor relates to this aspect it is therefore successful.'

The same result, i.e. that the defendant's conduct need not be the sole cause of criminal harm, is also the prevalent view in Germany, where the courts adhere to a metaphysical concept of causation and apply the so-called 'theory of condition'. According to this theory every *sine qua non* or necessary condition of an event is its cause when it cannot be eliminated from the chain of events without eliminating the result.[26] The prevalent view also takes as the starting point of the theory the proposition that all conditions of a consequence which cannot be eliminated in thought without eliminating the consequences are equivalent in causal value.[27] Thus, a certain fact need not be the sole or the main cause of a result, it suffices that it is one of the number of causes.[28]

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[26] 13 November 2003 BGH NStZ 2004, 151.

Likewise, English courts accept that contributory causes need not stand in the way of establishing a causal link.[29] English courts have often claimed that causation should be established by the application of common sense. They have developed a multitude of principles in order to establish a causal link between the conduct and the result.[30] Highly influential on the English law of causation has been the work of Hart and Honoré who in their opus magnus *Causation in the Law* base their concept of causation on ordinary language philosophy rooted in a liberal individualist analysis of human agency.[31] Their analysis is based on what people consider a 'normal' result of a particular conduct or event, 'as part of the usual state or mode of operation of the thing under inquiry'.[32] We thus look for things that make the difference between the accident and things going as usual and consider these as causes.[33] The drawback of this common-sense approach is that it introduces a degree of uncertainty into the evaluation process, as it relies on conventions which are subject to change. What we consider normal can change due to new scientific insights or changing social norms and values; what was not considered a cause yesterday might become one tomorrow and vice versa. Thus, while Hart and Honoré's approach seems to correctly outline the common human pattern of thought, from a legal point of view, and in particular from the perspective of legal certainty, it seems problematic.

Leaving these theoretical matters aside, it seems clear that not only may conduct of third parties contribute to the occurrence of a particular result, but it can also be other factors such as predispositions of the victim which can lead to results that by an impartial observer might be perceived as puzzling. This is because the concrete result is generally not associated with the kind of conduct practiced by the defendant. Experience has for instance told us that death is not the common result of a slap in the face, but nevertheless every now and then such cases do arise. Often in these cases certain predispositions of the victim exacerbate the injury resulting from the conduct and lead to the unexpected outcomes. Classic examples of this category are stabbing a haemophiliac, slapping a person with an egg-shell skull or where the victim was suffering from symptoms of old age. A pertinent example of the latter can be found in the following Dutch case: the Court of First Instance and the Court of Appeal had convicted the defendant of aggravated theft causing death (Article 312 (3) DCC) after an 84-year-old woman died in the course of a burglary carried out by the defendant and his partner.

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[27] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem §13 Mn 76.

[28] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 65.

[29] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 91 et seq.

[30] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 90–111.

[31] H.L.A. Hart and T. Honoré, 'Causation in the Law' (Oxford University Press 1985), pp. 75–93.

[32] H.L.A. Hart and T. Honoré, 'Causation in the Law' (Oxford University Press 1985), p. 35.

[33] H.L.A. Hart and T. Honoré, 'Causation in the Law' (Oxford University Press 1985), pp. 35–61.

Dutch Supreme Court, 12 November 1985, NJ 1986, 782

'Rendered in the appeal against a judgment of the Court of Appeal in Amsterdam of 21 January 1985 in the case against defendant Martinus Bernardus Jacobus C., at present detained at Amsterdam Penitentiary "De Weg".

1. The appealed decision

The Court of Appeal confirmed the judgment of the Court of First Instance in Haarlem of 20 July 1984, in which the defendant was found guilty and sentenced to six years imprisonment for theft, preceded and accompanied by acts of violence and threat of violence against persons, committed with the intention to prepare or facilitate the theft, causing the death of victim. [Article 312 (3) DCC – JK.]

2. The Appeal

The defendant appeals against conviction and claims that it cannot be proven beyond reasonable doubt that the victim died as a result of the acts or threats of violence committed by the defendant and his partner. Accordingly the defence claims that the required causal link between the acts of violence and the death of the victim cannot be established.

4. Findings of the Court

4.1. The following facts have been proven against the defendant:

that he on 16 February 1984 in the municipality of Wormer, together with another, with the intention of unlawful appropriation, took away 800 Dutch Guilders and several pieces of jewelry, not belonging to himself or his partner. This theft was preceded and accompanied by acts of violence and threats of violence against H. Pranger [the victim – JK] in order to prepare and facilitate the crime. He and his partner threatened and violently grabbed the victim who was of old age (84 years), and forcefully handcuffed and gagged her with gaffer tape. Subsequently the victim was tied to a chair. As a result of the exerted violence and considering a preexisting cardiovascular disease the victim died shortly after.

[...]

5. Judgement of the Supreme Court

[...]

5.3. The Court of Frist Instance and the Court of Appeal, correctly held that it was a widely known fact that strong emotions can frequently lead to fatal results with people of old age. Contrary to what the defence has claimed, it cannot be argued that the fact that the Court of First Instance based its assessment on a supplementary expert report of 11 May 1984 shows, that the vulnerability of people of old age was not a widely known fact. Apparently, the Court of First Instance as well as the Court of Appeal deduced from the adduced evidence, including the expert report, in combination with the aforementioned widely known fact, that the death of the victim

> as a result of the violence committed can reasonably be attributed to the defendant. This decision does not contain any mistakes of law nor is it for any other reason incomprehensible.
>
> 5.4. The argument of the defence therefore fails.
>
> [...]
>
> 7. The Supreme Court dismissed the appeal.

Predispositions of the victim are only very rarely accepted to break the chain of causation. The general approach of criminal law is nicely conveyed in the English dictum, 'the defendant has to take its victim as he finds it'. Other penal systems, such as those in Germany and England, reach similar results in these situations.[34]

While these cases may be deemed difficult from a strict doctrinal point of view, it is argued here that the results reached by the courts nicely reflect what is to be the essence of causation, namely the *just attribution* of criminal liability. The cardinal question thus is whether the defendant is liable for the particular consequence that has occurred. This constitutes a normative evaluative inquiry and the implication of this normative inquiry is that someone who engages in dangerous and wrongful activities ought to bear the risk of injuries exacerbated by the victim's poor state of health.[35]

4.2. INTERVENING CAUSES

While contributing factors can sometimes make the establishment of a causal link difficult, matters become even more complicated when between the offender's conduct and the final results other acts or events intervene. Consider for instance the following scenario. A shoots at B with intent to kill. The bullet however misses B's heart but hits his shoulder. B drives himself to the hospital but on his way there is involved in an accident and dies. While it would be possible to say here that A's conduct was a factual cause for B's death, a further question is whether he should also be held criminally liable for this result.

4.2.1. Naturally occurring interventions

Intervening causes can take a variety of different forms. The most obvious is perhaps the intervention of what we may term a natural event. Those natural events can break the chain of causation but only under the condition that they were extraordinary and not reasonably foreseeable.[36] Thus if the occurrence of the natural event could be reasonably expected, the chain of causation will not be broken. If A for instance knocks down B and leaves him in his bedroom, not seriously injured but unconscious, and the building subsequently collapses in a sudden earthquake, killing B, A cannot be held liable for murdering B. The same reasoning would generally apply where the victim of an assault contracts scarlet fever in hospital. In these exceptional cases fate seems to intervene and negate any causal connection between the defendant and the harmful result.

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[34] See for instance: R v Watson [1989] 1 WLR 684; see also: C.M.V. Clarkson and H.M. Keating, 'Criminal law: Text and Materials' (Sweet & Maxwell 2003), p. 447.

[35] See also: W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 176.

Conversely, if A knocks B down on the beach and leaves his victim in peril of the incoming tide in which B drowns, the natural event was reasonably foreseeable and the chain of causation will not be broken.[37] In this case the drowning is the 'natural' consequence of A's actions, a consequence which might be expected in the normal course of events. These were essentially the facts of the Australian case of *R v Hallet*. In this case the defendant struck the victim in the head on a beach in order to repel his unwelcome sexual advances. He left the unconscious victim behind, who subsequently drowned in the incoming tide. The court held that the victim's death was the result of an 'ordinary' operation of natural forces and convicted the defendant of murder.[38]

4.2.2. Conduct of the victim breaking the chain of causation

It is furthermore possible that, prompted by the offender's initial conduct, the victim's subsequent acts intervene in the chain of events. Think for instance of panic reactions or other irrational conduct prompted by fear, despair, etc. An illuminating example can be found in the English case of *R v Roberts*.

> **R v Roberts (1971) 56 Cr App R 95**
>
> 'Appeal against conviction.
>
> The appellant was convicted on June 23, 1971, at Cheshire Quarter Sessions of assault occasioning actual bodily harm and was fined £50 by the Chairman (His Honour Judge David, Q.C.).
>
> The girl's story was that on the evening of May 1 she went to a base camp for troops in Lancashire, being at that time engaged to be married to an American serviceman who had gone to Vietnam. She was friendly with many of the people at that base, and from there she went on to a party where she met the appellant, for the first time. She left that party at about 3 a.m., having agreed to travel with the appellant in his car

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[36] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 95 et seq.; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 108.

[37] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 108.

[38] R v Hallet [1969] SASR 141, cited in K. Arenson, "Thabo Meli revisted: the pernicious effects of result-driven decisions' Journal of Criminal Law (2013), pp. 41–55.

to what he said was another party in Warrington. […] They took a curious route to Runcorn, and eventually, she said, they stopped on what seemed like a big cinder track. The time by then was apparently about 4 a.m. Then, she said, "He just jumped on me. He put his hands up my clothes and tried to take my tights off. I started to fight him off, but the door of the car was locked and I could not find the catch. Suddenly he grabbed me and then he drove off and I started to cry and asked him to take me home. He told me to take my clothes off and, if I did not take my clothes off, he would let me walk home, so I asked him to let me do that. He said, if he did, he would beat me up before he let me go. He said that he had done this before and had got away with it and he started to pull my coat off. […] Then he drove on. "Again," said the girl, "he tried to get my coat off, so I got hold of my handbag and I jumped out of the car. When I opened the door he said something and revved the car up and I jumped out. The next thing I remember he was backing towards me and so I ran to the nearest house. He backed and shouted and then he drove off," and then she remembered being in the lady's house. She said she was taken to hospital, where she was treated for some concussion and for some grazing, and was detained in hospital for three days. […]

[The learned Lord Justice stated the facts set out above and continued:]

In those circumstances, the jury had to make up their minds, first of all, whether the appellant had indecently assaulted this girl; and after a direction to the jury of which no complaint is made, or could be made, the jury acquitted him, as has been said, on that charge.

Next, they had to consider: was the appellant guilty of an assault occasioning her actual bodily harm? Of course, for that to be established, it had to be established that he was responsible in law and in fact for her injuries caused by leaving in a hurry the moving car, and it is the Chairman's direction with regard to the law on the second count which leads to this appeal. […]

We have been helpfully referred to a number of reported cases, some well over a century old, of women jumping out of windows, or jumping or throwing themselves into a river, as a consequence of threats of violence or actual violence. The most recent case is the case of Lewis [1970] Crim.L.R. 647. An earlier case is that of Beech (1912) 7 Cr.App.R. 197, which was a case of a woman jumping out of a window and injuring herself, and of a man who had friendly relations with her, whom she knew and might have had reason to be afraid of, being prosecuted for inflicting grievous bodily harm upon her, contrary to section 20 of the Offences against the Person Act. In that case the Court of Criminal Appeal (at p. 200) approved the direction given by the trial judge in these terms: "Will you say whether the conduct of the prisoner amounted to a threat of causing injury to this young woman, was the act of jumping the natural consequence of the conduct of the prisoner, and was the grievous bodily harm the result of the conduct of the prisoner?" That, said the Court, was a proper direction as far as the law went, and they were satisfied that there was evidence before the jury of the prisoner causing actual bodily harm to the woman. "No-one could say," said Darling J. when giving the judgment of the Court, "that if she jumped from the window it was not a natural consequence of the prisoner's conduct. It was a very likely thing for a woman to do as the result of the threats of a man who was conducting himself as this man indisputably was."

> This Court thinks that that correctly states the law, and that Mr. Carus [for the defence – JK] was wrong in submitting to this Court that the jury must be sure that a defendant, who is charged either with inflicting grievous bodily harm or assault occasioning actual bodily harm, must foresee the actions of the victim which result in the grievous bodily harm, or the actual bodily harm. That, in the view of this Court, is not the test. The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so "daft," in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.
>
> […]
>
> The Court has come to the conclusion, after the assistance of the arguments of counsel on both sides, that the judge was right to tell the jury that it was their duty to convict if they accepted the evidence of the girl, and there was no misdirection involved in his telling them just that. For those reasons, the Court finds no misdirection in the summing-up, and nothing in the grounds of complaint made on behalf of the appellant, and this appeal against conviction must be dismissed.'

The test applied here by the English court can be seen to also represent the prevalent approach in Germany and the Netherlands. The test applied by all courts (similar to the one applied to natural intervening events, mentioned above) is based on the notion of foreseeability and asks whether or not the response fell within the range of reactions which could have reasonably been expected from a victim in this situation.[39] Only when the victim's reaction is to be considered daft will the chain of causation be broken. It should be clear that precise criteria as to when a particular conduct will be considered daft can hardly be established. Factors like the age, mental capacities and perhaps even the sex of the victim can play a role here. Furthermore, the potential dangerousness of the conduct and the fact that this conduct directly caused the harmful response can be relevant.

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[39] Responses of victims can sometimes also occur protractedly. Think for instance of an abused woman who opts to escape her dire situation by committing suicide, or a victim who survives an initial attack but is left severely injured, which later causes her to commit suicide. Illustrative is a Dutch case (Gerechtshof Den Haag, 4 March 2014, ECLI:NL:GHDHA:2014:621) where a boyfriend out of jealousy in 2011 poured acid over his girlfriend's face. The woman survived the initial attack but suffered severe burns, which 16 months after the incident, in 2013, caused her to commit suicide. The Court of Appeal ruled that the defendant was responsible for the victim's suffering and despair and had therefore also caused her death. The long period between the original deed and the death of the victim did not, according to the court, break the chain of causation as the nature of the injuries inflicted made it difficult for the victim to come to terms and get to grips with her dire situation. For an English perspective see: J. Youngs, 'Domestic violence and the criminal law: reconceptualising reform' Journal of Criminal Law (2015), pp. 55–70; J. Horder and L. McGowan, 'Manslaughter by causing another's suicide' Criminal Law Review (2006), pp. 1035–1046.

Closely connected to the foregoing category of cases are instances where the victim met his death by refusing to undergo a life-saving surgery. Here once more it would seem that the most immediate cause of the result was the victim himself. However, for reasons of social responsibility and penal policy, even in these cases a causal link can be established under certain circumstances. Illuminating here is a decision of the Dutch Supreme Court.

Dutch Supreme Court, 25 June 1996, NJ 1997, 563.

> 'Rendered in the appeal against a judgment of the Court of Appeal in 's-Gravenhage on 24 April 1995 in the criminal case against defendant H.E.A. van B. at present detained at Scheveningen Penitentiary.
>
> Judgment of the Court of Appeal
>
> Conclusive evidence
>
> The court has found conclusive evidence which proves that the defendant on 15 July 1994 in 's-Gravenhage intentionally killed N.Y.K., as he intentionally fired a shot at N.Y.K. which hit the victim in the neck and caused paraplegia and pneumonia which led to the death of N.Y.K.
>
> Dismissal of the arguments of the defence
>
> The defence has argued that the causal link between the defendant's conduct and the victim's death could not be established, as it was the victim's own choice to refuse treatment against the pneumonia which was a result of the paraplegia caused by the defendant's shot. The defence thereby relies on the report of neurologist Dr. R.W.M. Keunen from 23 August 1994 which establishes that the victim died due to pneumonia, although, taking into account the current standard of medicine, it would have been possible for her to survive had she received treatment.
>
> The Court of Appeal dismisses this plea
>
> Taking into account the aforementioned expert report, the complication in the form of pneumonia was a direct result of the injuries which the defendant inflicted on the victim. This cannot be diminished by the fact that the victim chose to refuse theoretically possible treatment, given that the treatment, although it might have prolonged her life, could not have been expected to assure her a dignified existence. The decision to refuse treatment for the pneumonia caused by the gunshot wound does not therefore stand in the way of attributing the victim's death caused by the infection to [the conduct of] the defendant. […]
>
> Neurological report [used to dismiss the appeal]
>
> 1. Would a treatment of the pneumonia been possible and if so what would it have consisted of?
>
>   Answer: The treatment would have consisted of the administration of antibiotics and frequent draining of the airways.
> 2. Which effects could the treatment have had?
>
>   Answer: It could have led to a containment of the infection preventing the complications caused by the pneumonia. Complications in this context means the lack of oxygen caused by the pneumonia.

3. Could Nathalie K. still be alive today and if so what would be here general condition, taking into account that she was paraplegic?
   Answer: The patient had a fracture of the 4th and 5th cervical vertebra. This means that she lost the feeling in, as well as any control over, her arms and legs. In the best case she would have been able to slightly move her shoulders. Furthermore the patient would have suffered from permanent incontinence. Moreover the patient would have been reliant on artificial respiration as the paraplegia would have also affected her respiration. […] Had the patient opted to treat the pneumonia it must be assumed that, taking into account the current standard of medicine, she would still be alive.
4. […] Considering the aforementioned information, it has to be concluded that a precise estimation of the patient's remaining life expectancy cannot be made. Taking into account her young age, it can be assumed that in the best case it would be approximately ten years. Thereby, it has to be mentioned that such a life, considering her total dependency on the help of others, would have been a life which no one would wish for, which clearly she did neither.
   […]
   Judgment of the Supreme Court:
   […]

5.3. The defence has argued that the victim's choice to refuse medical treatment for pneumonia, a complication resulting from the gunshot wound has broken the causal link between the defendant's conduct and the death of the victim. For this reason the defence argues that the Appeal Court erroneously or on insufficient grounds rejected the argument of the defence.

5.4.1. As is apparent from the expert report mentioned above, the Court of Appeal has established that the victim incurred a neck injury due to a gunshot wound whereby inter alia the spinal cord in the cervical spine was severed and that as a result of this injury pneumonia developed which led to the death of the victim. In its judgment the Court of Appeal expressed the view that the victim's death was a result of the defendant's conduct. This finding is not diminished by the fact that the victim herself choose to forego the possibility of treating the infection, given that this decision does not stand in the way to attribute the death as a result of the infection to the defendant.

5.4.2. With this finding the Court of Appeal has expressed the view that the defendant brought into existence the circumstances which prompted the victim to forego medical treatment and that this decision, in the causal chain of events, was not of such a quality that the death of the victim could any longer be reasonably attributed to the defendant's conduct. This decision does not contain any mistakes of law and nor is it for any other reason incomprehensible, taking into account the utmost severity of the injuries the victim incurred due to the defendant's conduct.

5.5. Therefore the appeal has to be dismissed.'

The Court thus stressed that the defendant had caused the circumstances which led the victim to choose the lesser of two evils. An important factor in that judgment was the extremely severe injuries caused by the defendant and the fact that her decision was, taking into account the fact that her life expectancy after the incident had decreased to a maximum of ten years, deemed understandable. It can be deduced from that reasoning that in cases where the injuries are less severe a refusal of medical treatment will be seen as less understandable. In this case the victim's actions might break the chain of causation.[40]

A similar approach is prevalent in England, where in *R v Blaue* the principle that 'the defendant has to take his victim as he finds him' was expanded to cover not only the body but also the victim's decisions.[41] In this case the defendant stabbed an 18-year-old girl in the leg. At the hospital she was told that she needed a blood transfusion to save her life. As a Jehovah's Witness she refused the transfusion, as a result of which she died. Despite the victim's decision to refuse treatment, the Court held that the causal chain had not been broken.

Likewise, the causal link will not be broken in these cases in Germany, as long as the decision of the victim to refuse certain treatment is not considered daft.[42] The refusal to undergo a surgery was for instance, considering the mortality rate of 5–15% for this particular surgery, not considered daft.[43] Here, frictions with the principle of individual autonomy and responsibility clearly arise and the emphasis on the (unusual) result, i.e. death, instead of the (life-threatening) conduct can only be explained by evoking considerations of common sense or criminal policy. We simply conceive causes of death in terms of wounds and injuries rather than in terms of ideas and convictions, however absurd they may be.

4.2.3. Medical interventions

Intervening causes often also present themselves in the form of conduct by medical professionals. The question that arises here in regard to the doctrine of causation is whether the involvement of maybe poor medical treatment can break the chain of causation and bar the attribution of criminal liability to the initial actor. One could certainly argue that in these cases the doctor's conduct was the most proximate cause of the result. The general approach adopted in all countries is however a very strict one, certainly influenced by policy reasons and by recognition of the fact 'that doctors who have emergency surgery thrust upon them cannot be expected to get it right all the time'.[44] A case of the German Supreme Court might serve as an example here.

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[40] D.H. De Jong and G. Knigge, 'Het materiële strafrecht' (Kluwer 2003), p. 84.

[41] R v Blaue [1975] 3 All ER 446.

[42] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 408 et seq.; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 80.

[43] 14 November 2000 OLG Celle NJW 2001, 2816. See also: 9 March 1994 BGH NStZ 1994, 394.

[44] W. Wilson, 'Central Issues in Criminal Theory' (Hart Publishing 2002), p. 181.

German Supreme Court, 8 July 2008, NStZ 2009, 92

> 'In the early hours of 23 April 2006 a verbal dispute between the defendant and his wife took place. In the course of this argument the defendant, who weighs 128kg, sat forcefully on the ribcage of his wife, who was lying on her back. Due to the impact the victim suffered 18 rib fractures. The defendant sat for almost two minutes on his wife, almost suffocating her. […]
>
> The victim underwent medical treatment from 25–28 April 2006 in the local hospital. The attending doctor ordered two X-rays and diagnosed three broken ribs. On 2 May the victim consulted her general practitioner because of her injuries who prescribed pain killers and ordered her to rest. On 9 May she visited him again with pain in her leg. In the following days her condition deteriorated quickly. She died during the night of 24 May 2006. An autopsy revealed sepsis as the cause of death, resulting from her multiple rib fractures, some of which had pierced the chest cavity.
>
> The Court of Lower Instance argued that the causal link between the assault and the death had not been broken by palpably wrong treatment, nor by the conduct of the victim. […]
>
> The Court of Lower Instance found the defendant guilty of infliction of bodily harm causing death (§227 GCC) and imposed a prison sentence of five years. The defendant appeals against conviction. The appeal must be allowed. […]
>
> III. The case is referred back for a retrial. In this, the chamber points out, the following points will have to be considered carefully.
>
> The causal link between the assault and the death needs to be evaluated diligently.
>
> As regards an error in treatment of the attending physician in the hospital, the gravity of the mistake has to be assessed, taking into account how many fractures a prudent and well-educated doctor could have detected on the X-rays or if inconclusive tests should have provided impetus for further investigation. To determine the gravity of an eventual error in treatment it will also have to be considered which treatment would have been required after a diligent diagnosis carried out *de lege artis*.
>
> It should furthermore be considered if the causal link might have been broken by the conduct of the victim as she did not consult a doctor over her fractures after the 2 May, despite the fact that her general condition deteriorated. In this regard one will have to consider how much pain and other symptoms could be perceived by the victim which should have prompted her to seek medical attention […].'

Thus, the general approach is that medical treatment carried out corresponding to *de lege artis* will not break the chain of causation. Only in exceptional cases where the standard of treatment fell far below what one might reasonably expect will the causal chain be broken.[45] Illustrative for the general approach is the

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[45] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 183 et seq.; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 105 et seq.; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 419–421.

English case of *R v Cheshire*.[46] In this case a rare complication was held to be a direct consequence of the appellant's act which remained a significant cause of death. The Court of Appeal held:

> 'Even though negligence in the treatment of the victim was the immediate cause of death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and itself so potent in causing death, that they regard the contribution made by his act as insignificant.'

Crucial in this category of cases is thus that the wound, etc. can (still) be seen as an operating and substantial cause of death in the chain of causation.[47] Accordingly, a wound can no longer be seen as an operating and substantial cause if the treatment was 'palpably wrong', so that the second cause is more potent and overwhelms the causal salience of the original wound. There is some debate in the countries under consideration regarding the degree of negligence required for the interruption of the causal link, but it is generally agreed that grossly negligent treatment will stand in the way of attributing criminal liability.[48]

4.3. CAUSAL UNCERTAINTIES IN THE MODERN RISK SOCIETY

In our modern highly industrialised society we have learned to understand that sometimes the smallest cause can trigger the severest consequences. Unfortunate connections of chains of events often lead to large-scale disasters. Consider for instance the aforementioned collapse of the ice rink in Bad Reichenhall, and likewise in environmental or product liability cases, causes often cumulate and combine to give rise to grave results. Think for instance of two factories each emitting a chemical compound which by itself is harmless but both of which if combined become toxic and poison the groundwater. These cases are challenging for criminal law as it is difficult to definitively attribute a specific result to one or even several actors. It is especially here where the line between human causes and natural events, i.e. accidents, becomes illusive. This is the case because the establishment of a causal link often presupposes a certain scientific knowledge about cause and effect, which sometimes may not exist. An illustration of these complications can be found in a German case concerning a wood preservation agent, which also provides us with some valuable insights on how courts try to deal with these situations.

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[46] R v Cheshire [1991] 3 All ER 670.

[47] For similar German case law see: 8 July 2008 BGH NStZ 2009, 92. For similar Dutch case law see: HR 23 December 1980, NJ 1981, 534; HR 7 May 1985, NJ 1985, 821.

[48] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 183 et seq.; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 106; C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), pp. 419–421.

German Supreme Court, 2 August 1995, NStZ 1995, 590

'Facts of the case:

The defendant Dr. St. was from 12 October 1972 until 1 April 1987 the technical executive director of company D. The defendant H. has since 1 April 1977 been the sales executive director of this company. The corporation mainly produced wood preservation agents. The agents inter alia contained the biocidal compound pentachlorophenol (PCP) and lindane.

The Regional Court came to the conclusion that the wood preservation agents which the defendants sold after 1 January 1978 (e.g. Xyladecor 200 containing lindane) or which they had sold before and further did not prevent their usage indoors (e.g. Xyladecor containing PCP and lindane) caused bodily injuries to 29 persons. The Regional Court convicted the defendants of causing bodily harm by negligence (§229 StGB) [...] and sentenced them to a suspended prison sentence of 1 year. The defence as well as the Public Prosecutor lodged an appeal against this judgment.

The remedy of the defence is successful. The remedy of the Public Prosecutor fails.

Held:

The Regional Court, after hearing several expert opinions assumed a causal link between the biocidal compounds of the wood preservation agents and the bodily harm [...].

Next to the evidence given by experts the Regional Court based its decision on the following circumstantial evidence:

a) The indispositions occurred in occupants of houses inside which the wood impregnation agents had been applied extensively.
b) Prior to the application of the agent and before moving in the injured parties were in good health.
c) The first adverse effects already manifested during the application of the agent and soon after moving in. [...]
d) After moving out of the rooms treated with the agent or after its removal the physical condition of the injured parties significantly improved. [...]

III. Appeal by the defence:

2. The defendants in their appeal in particular challenge the consideration of evidence concerning the effects of the biocidal compounds on the human body.

They claim that the conclusions drawn by the Regional Court are in contradiction to general scientific experience. At least in regard to the connection of low dosages of poisonous compounds a link between the biocidal compounds of the agent and the bodily injuries cannot be scientifically established beyond reasonable doubt, let alone be proven.

The assumption of the Regional Court, derived from the expert witnesses Prof. Dr. W. and Prof. Dr. A. regarding the effects of the biocidal compounds on human

> cells are not shared by distinguished immunologists or toxicologists but are rather diametrically opposed to established insights of these sciences. In cases where courts have to deal with the laws of nature, the judge must suppress his personal convictions if a scientific proof has not yet been found. Just as it is established in jurisprudence that confirmed scientific facts carry such an evidentiary value that any counterevidence in the case at hand […] is ineligible, the scientific "*non liquet*" [it is not clear] surrounding a particular topic ought to be binding for courts as well.
>
> The remedy succeeds.
>
> The Chamber need not decide whether or not the Regional Court in establishing a causal link between the biocidal compounds of the agents and the bodily harm relied on expert evidence which disregarded confirmed scientific insights. The appeal already succeeds as the Regional Court relied on new scientific insights without mentioning and discussing the critique brought forward against these findings.
>
> However, the Chamber cannot follow the opinion of the defence that by applying the in *dubio pro reo* principle a causal link may not be assumed if the causal connection is scientifically disputed and not yet proven. […]
>
> No legal rule prevents a judge, after hearing expert evidence, to base his judgment on facts which are the subject of a scientific debate. […] When considering the evidence in the verdict he may reach conclusions which are yet beyond scientific doubt. […] The conclusion reached may however not be in opposition to logic and assured scientific knowledge.
>
> The repercussions of this for the case at hand are as follows: Even if scientific opinion is divided about how and in which manner the poisonous compounds, to which the victims were exposed here, have caused bodily injuries, the judge may, by weighing all the circumstantial evidence and scientific opinions, come to the conclusion that the exposure to the wood preservation agent has caused bodily injuries in certain cases. A causal link between the agent and the bodily injures cannot only be established if the effects of the compounds on the human body have been scientifically proven or if all other possible causes of the bodily harm can be enumerated and ruled out. An exclusion of other causes can in fact also be accomplished by an overall assessment of scientific knowledge and circumstantial evidence. Thus it is not necessary that all causes be evaluated in detail but rather that it can at least be established that exposure to the wood preservation agent was at least partially causal for the result that occurred.
>
> […] If the judge however relies in his verdict on insights or methods that are not yet scientifically proven, it is necessary to describe the state of affairs of the scientific debate in order to provide the opportunity, in the case of an appeal, to assess whether the pros and cons of a certain method or insight have been weighted correctly.
>
> It is necessary to outline all the facts which will allow an appellate body to assess the conclusiveness of particular expert evidence and its compatibility with proven scientific insights.
>
> The present judgment fails to adhere to these standards, which is why the appeal has to be allowed.'

Without a doubt this case is influenced by policy considerations regarding the responsibility of producers for their products, but it nicely demonstrates the difficulties that the establishment of a causal link in modern society can encounter. It is even arguable that with the decision in the wood impregnation case the German Supreme Court has sidestepped the *conditio sine qua non* and has adopted an approach based on statistical probabilities.[49] In modern society where the avoidance of future harms has become our primary concern and where we have learnt that accidents do not just happen but are usually the result of a series of critical events and decisions, the doctrine of causation is often sidestepped or broadened. The difficult task here for criminal law is to pin harmful effects on individual (business, economic, etc.) actors, which can hardly be isolated within the complex system of industrial production processes, etc.[50] Accordingly, the isolation of single causes and responsibilities becomes a daunting challenge. As a result, in certain cases, in order to avoid indemnity, liability is increasingly separated from causality and can crop up almost anywhere.[51] While in the modern risk society there might be good reasons for the establishment of a causal link, in these cases it should not be overlooked that a substantial amount of (objective) uncertainty remains.

5. CONCLUDING REMARKS

It has been attempted to show that causation fulfils an important role in the realm of criminal law. It fulfils a dual role in ensuring that people will not be held responsible for harms which cannot properly be seen as their making. On the other hand, its task is to ensure that liability can be attributed to actors that have caused a certain criminally proscribed result. The term 'to cause' however carries a variety of connotations, which is reflected in the fact that on a doctrinal level causation can be seen as a multi-purpose tool that can have an explanatory as well as an attributive function. Answers to the question of causation will differ according to the purpose for which the question is asked. One cannot for instance give an answer to the question of causation for the purpose of attributing liability according to some rule without taking the purpose and scope of that rule into consideration. The doctrine of causation fluctuates between the explanatory and the attributive function and penal systems have given different weight to the two aspects.

In Germany the concept is still by and large conceived as a metaphysical one which would lead to wildly differing results. Scholars have therefore added a second normative level which is supposed to circumscribe legal responsibility for physically causal acts. This has however not been entirely accepted by the courts, which in relation to intentional crimes often try to limit liability at the level of mens rea and wrongdoing. In the Netherlands and England on the other hand, causation is generally seen as a legal concept in which normative considerations have been embedded in the evaluation process.

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[49] C. Roxin, 'Strafrecht Allgemeiner Teil, Band I Grundlagen: Der Aufbau der Verbrechenslehre' (Verlag C.H. Beck 2006), p. 358.

[50] U. Beck, 'Risk Society – Towards a New Modernity' (SAGE Publications Ltd 1992), pp. 32–33.

[51] A. Giddens, 'Risk and Responsibility' The Modern Law Review (1999), p. 10.

The starting point of causal evaluations in all penal systems is the so-called '*conditio sine qua non*' or 'but for' test. Although riddled with conceptual difficulties the test nevertheless constitutes an important baseline for the imposition of criminal liability. Prima facie it seems fair to conclude that should the test produce a negative result an attribution of liability will, leaving aside exceptional cases, not be warranted. In order to countermand the over-inclusiveness of the test it does however seem advisable to apply further (normative) criteria in order to fine-tune the attribution of liability in the case at hand.

We have seen that a variety of different factors can have an impact on the establishment of a causal link. Not only the scope of the underlying criminal offence, but also penal policy, blameworthiness and other contributory factors can wield influence here. Despite the fact that the approaches of penal systems to the conundrum of causation are diverse, some common principles can nevertheless be discerned. First, the conduct of the defendant need not be the sole cause. Other factors can have contributed as well, but which for the attribution of liability are faded out. One may for instance think here of predispositions of the victim, etc. Furthermore, intervening causes need not necessarily break the chain of causation. The conduct of the victim or interventions of third parties, such as doctors or emergency services, etc., need not impede the attribution of liability.

CHAPTER VII

FORMS AND ASPECTS OF MENS REA

Jeroen Blomsma and David Roef

1. INTRODUCTION

Actus non facit reum nisi mens sit rea, as the Latin maxim goes, is often expressed to indicate that a crime can only be committed if the two basic set of elements are fulfilled. As already discussed in Chapter IV, the first set of elements is called actus reus. This consists of the objective elements of a crime, like conduct, consequences or circumstances. The second set of elements is called mens rea or the subjective or fault elements of every crime. These elements include intention and negligence. To illustrate this, consider the offence of manslaughter in Article 287 DCC: 'a person who intentionally takes the life of another is guilty of manslaughter.' The taking of life is the actus reus of the crime, and the required intention as to that conduct is the mens rea.

The Latin maxim makes clear that as a rule, criminal liability cannot be imposed for merely thinking of doing something criminal. Someone needs to act before we can punish him. The mere circumstance that you thought about killing your professor does not make you criminal. Only when you have started to take action in order to execute this idea may criminal liability arise.[1] Secondly, a person can only be convicted for conduct or consequences that he brought about intentionally or at least negligently. A degree of mens rea must have been present in order to trigger criminal liability. For example, you cannot be held criminally liable if you neither knew, nor should have known, that by opening the door you would injure the person standing behind it.

Nonetheless, the reality in many legal systems is that these rules are not applied in a rigid manner. As soon as you talk about killing your professor with another student, you may be liable in some systems for conspiring to kill him. As far as the requirement of an actus reus is concerned, offences of conspiracy are therefore problematic. The rule that mens rea is an essential element of every offence seems to be applied with even less consistency. For instance, many legal systems punish without requiring proof that the accused was at least negligent. For instance, in England and the Netherlands, you may be punished for having sexual relations with a minor, regardless of whether you knew or should have known that that person was indeed a minor.[2] In most EU states, you may also be fined for speeding, regardless of whether you knew or should have known that you drove too fast. The self-evident nature of such crimes, also called strict liability offences, begs the question why we require mens rea in the first place.

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[1] See: Chapter IX.

From a historical perspective, requiring mens rea for criminal liability can be explained as a counter-reaction to liability that is merely based on harmful outcomes. It is a principle that protects persons who cannot be reproached for the criminal act they committed. The Latin maxim is translated as 'an act does not make a man guilty unless his mind is (also) guilty.'[3] In other words, the criminal wrong of an offence consists not only of the act or consequence, but also by the concomitant state of mind. People are recognised as autonomous, sensible persons, who can be held accountable for the choices they make. Proof of mens rea denotes a sufficient degree of control and choice over actions. By requiring mens rea, it is safeguarded that the defendant is only held liable if he had the capacity and opportunity to do otherwise.

From the perspectives of retribution and deterrence, the subjective connection between act and actor is also important. Punishment that is merely based on unfortunate outcomes is neither deserved nor useful. Retribution is grounded in the fact that the defendant chose to commit the actus reus of the offence. This reflects his hostility or indifference towards the legal interest of the victim, which warrants punishment. The opposite is also true, as it would be unfair to punish the defendant who cannot be reproached for what he did. Moreover, it would have little use. Neither this defendant, nor other persons are deterred from committing similar acts if it is a matter of luck. Without mens rea, without any degree of control, the legal subject is not influenced by the law to adapt his behaviour. In other words, both retributive and preventive goals of punishment can only be fulfilled if criminal liability and punishment follow upon establishing mens rea.

2. DIFFERENT FAULT ELEMENTS COMPARED

Often, the term mens rea is used to refer to the different fault elements of a crime such as intention and negligence. The law distinguishes between these elements in order to distinguish relative degrees of culpability. All other things being equal, the intentional actor is more culpable than the negligent actor, because the former wanted to bring about the actus reus. Accordingly, people can be punished much more severely for intentional crimes than for negligent crimes.

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[2] Article 245 DCC and section 5 of the English Sexual Offences Act 2003. In contrast, intent must relate to the age of the victim in §176 GCC.

[3] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 9; C.J.M. Safferling, 'Vorsatz und Schuld: Subjektive Täterelemente im deutschen und englishen Strafrecht' (Mohr Siebeck 2008), p. 292.

Secondly, the distinction in fault elements enables the limitation of criminal liability; some crimes can only be committed intentionally. For example, damaging goods is only punishable when the person intended to cause damage. Negligent damage can only be compensated under civil law. The rationale for this limitation is also based on the difference in culpability. The person who broke something but did not do this on purpose should not be punished.

The first problem that will be discussed here concerns the demarcation of these fault elements. It is clear that acting in order to bring something about constitutes the essence of intentional conduct, but what about other mental states such as acting whilst foreseeing a risk? What if you played football on the street, knowing there was a risk you might kick the ball against a window and break it? Can you be said to have intended this damage, if it in fact occurs? In many legal systems, this question is answered in the affirmative, equating risk-taking with a form of intention, whereas other legal systems, such as the English, adhere to a much more restricted concept of intention. Simply put, the difference between these approaches follows from different frameworks of mens rea. In Dutch and German law, only two major kinds of mens rea are distinguished: intention and negligence. The English framework is more fine-grained and includes a third subjective element in between intention and negligence, which is called recklessness. Recklessness bridges the gap between the most serious and the lowest limit of mens rea. As we will see, because of this middle ground, there is no need in English law to stretch the concept of intention to cases that would otherwise 'only' be deemed negligent.

2.1. DIRECT INTENT OR DOLUS DIRECTUS

Intention (dolus in Latin) is considered the most serious fault element in all legal systems. Intention consists of knowing and wanting. Accordingly, the elements of intention can be distinguished as being a cognitive part, on the one hand, and a volitional part, on the other. In civil law systems, which only distinguish between intention and negligence, intention is interpreted in a quite broad manner. The most serious form of intention is called direct intent or dolus directus. A slightly less serious form is indirect intent or dolus indirectus.[4] The lowest form is referred to as conditional intent or dolus eventualis.

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[4] In Germany and international criminal law this dichotomy is usually expressed as 'first' and 'second degree direct intention', or dolus directus in a first and a second degree.

Direct intent is what we would generally consider to be intentional conduct in an everyday sense, focusing on the will or desire of the actor to bring about a certain result. Dolus directus is intention in its purest legal and linguistic sense. It is 'acting in order' or 'deciding or seeking to bring about'.[5] The volitional component is dominant in direct intent. It is therefore not required that the actor was aware of the certainty or high likelihood of occurrence of the consequence. What is important is that he has the completion of the offence (element) as his purpose.[6] It is 'the will to realise' that makes the intent direct, not the chance of a consequence occurring, as the result is what matters to the actor.[7] A simple example may illustrate this: a man who desires to kill his adulterous wife with a firearm, and subsequently shoots her from a short distance in the chest, clearly intended to kill the victim. Even if the defendant remains silent, his intention can be deduced from the objective conduct in these circumstances. Now, the actor's intent will not be less 'direct' if he shoots at her from a great distance, knowing that he is a poor shot, and subsequently misses her. In such a case, he will still be liable for an attempt to kill her with dolus directus. A weak cognitive aspect, foreseeing only a small chance that he will succeed, is compensated for by a strong volitional aspect of desiring the result.

Direct intent reflects the highest degree of intent, because behaviour carried out willingly is considered to reflect the highest possible degree of control and choice. A person who shoots another with a firearm in order to kill has great control over the events and the outcome. Clearly, the shot might not be lethal, or the firearm might be jammed, but it is the actor who has most influence on the conduct and outcome, which warrants the highest reproach.

2.2. INDIRECT INTENT OR DOLUS INDIRECTUS

Indirect intent exists when the actor knows his conduct will almost certainly bring about consequences that he does not desire or primarily aim at. It deals with side effects that the actor knows are almost certain to occur.[8] For example, the perpetrator plants a bomb on an aeroplane in order to blow it up, after which he can collect the insurance money. His purpose is not to kill the passengers of the plane. However, he knows that in order to reach his goal of collecting the insurance money, the death of those people is almost certain. If the plane explodes and crashes, people will almost certainly die. The cognitive element, knowledge of certainty or high degree of probability, is more dominant than any volitional requirement. Thus, the result known or believed to be a condition of the achievement of the purpose is considered to be intended, even when it is not desired. However, mere foresight is insufficient for indirect intent, and brings us in the realm of dolus eventualis and the English concept of recklessness.

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[5] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 127–129.

[6] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 63; T. Fisher (ed.), 'Strafgesetzbuch und Nebengesetze' (C.H. Beck 2009), p. 105; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 94–95

[7] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 438–439.

[8] To be precise, in England, indirect intent is not considered a second form of intent, but merely evidence from which intention may be inferred, see: R v Woollin [1998] UKHL 28.

This form of dolus is called indirectus because the state of mind of the actor is not aimed directly at the result of the offence definition of the crime – in our example, the killing of the passengers and crew – but at another, further goal that does not form part of the offence definition, such as the destruction of the aeroplane and insurance fraud. This implies that the death of the victims is an indirect goal of the actual purpose. In comparison with this indirect form of intention, dolus directus is aimed directly at the result expressed in the offence definition.

The distinction between the two types of intention can be made by the so-called test of failure.[9] If the passengers miraculously survive, the actor would not consider his plans to blow up the plane and collect the insurance money to have failed. He had dolus directus as to the explosion and the insurance fraud, and indirectus as to the death of the passengers. By contrast, if the wife of the pilot intended to kill him, because he is cheating on her, or for any other reason, she would consider her plans to have failed if he survived. She clearly had dolus directus as to his death.

Another way of framing this is to distinguish necessary means on the one hand from side-effects that are almost certain to accompany the achievement of the purpose on the other. Goals that are not primarily desired but are understood as necessary means to the end goal fall under dolus directus as well. If the perpetrator wanted to collect the insurance for the aeroplane, the pilot's death is not a necessary means for his purpose, hence his death was indirectly intended. However, in the case of the wife who had dolus directus as to the death of her husband, the blowing up of the aeroplane is no longer just a side-effect, but a necessary means or interim goal and thereby also a consequence that was directly intended. Without the plane exploding, the wife could not realise her goal, i.e. the death of her husband. Regarding the explosion she therefore also had dolus directus.

These examples illustrate that both intentional actors are just as culpable. Both types of intent show that the defendant accepted the outcome, reflecting his bad character, showing that he was insufficiently motivated by the interests of his fellow citizens, and therefore deserves and needs to be punished.[10] The great degree of knowledge, the awareness of the certainty that the result will follow, also makes the rationale of control and that of choice apply to dolus indirectus. Because the actor is aware of the certain consequences of his actions, he can be considered to still be in control of the events.[11] It is this similarity that enables dolus indirectus to be put on the same footing as dolus directus.[12] Experience has taught us that unwanted side-effects can be even more harmful than intended goals.[13] In some cases, the 'advertent taking of an obvious and overwhelming risk of a certain result' can be 'considered to be just as deplorable as if it had been his or her primary purpose to bring about the result'.[14]

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[9] R.A. Duff, 'Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law' (Basil Blackwell Ltd 1990).

[10] I. Kugler, 'Direct and Oblique Intention in the Criminal Law' (Ashgate 2002), pp. 77–80.

Consequently, only in relation to some offence elements, direct intent and nothing less suffices. We may refer here to the specific intent requirement in terrorist offences to destabilise and frighten society, or in genocide, in which crime the actor aims to destroy, in whole or in part, a national, ethnic, racial or religious group. The defendant can only be held liable if he acted in order to bring about that specific purpose.

2.3. CONDITIONAL INTENT OR DOLUS EVENTUALIS

As a third type of intent, Germany and the Netherlands distinguish conditional intent or dolus eventualis. This fault element equates foreseen side-effects with intended results. It requires that the defendant was aware of the possible side-effects of his actions and he decided to act nonetheless, accepting these side-effects. The culpability of the defendant is therefore grounded in his conscious risk-taking, which warrants his status as an intentional actor.

2.3.1. *Meaning and rationale*

The term 'conditional intent' may be somewhat confusing, as it is not the intent which is conditional, but the occurrence of the result, i.e. the harmful consequence is dependent (conditional) on uncertain circumstances. In order to have a completed offence, the possible risk that the perpetrator consciously accepted must occur. But if the risk does not materialise, there is still conditional intent, which can ground attempt liability. Thus, the intent itself is unconditional, independent of a further condition like realisation of the risk. Consider someone who throws another person in a cold river with a strong current, realising the lethal danger beforehand but continuing anyway. The intent to kill is already present when the victim is pushed off the bridge, regardless of whether the victim dies or survives. Knowing the risk that the harmful consequence may occur, the perpetrator takes this risk into the bargain and acts anyway.

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[11] G.P. Fletcher, 'The Grammar of Criminal Law – American, Comparative and International – Volume One: Foundations' (Oxford University Press 2007), p. 315.

[12] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2014), §15 Mn 68–70.

[13] C. Prittwitz, 'Strafrecht und Risiko – Untersuchungen zur Krise von Strafrecht und Kriminalpolitik in der Risikogesellschaft' (Vittorio Klostermann 1993), p. 369.

[14] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 62.

The main rationale of dolus eventualis is that it enables an extended interpretation of intent, just like dolus indirectus, in order to hold that results have been intended even though they were not wanted. As mentioned, if it cannot be proven that the accused either wanted to fulfil an offence element or knew this was almost certain, there can be no liability for dolus directus or indirectus. Consequently, without the extended form of dolus, the accused could not be convicted for an intentional offence. In civil law systems that operate with only two kinds of fault – intention and negligence – this implies that only negligence liability remains possible. However, a conviction for a negligent rather than an intentional offence not only brings about a lower sentencing range; it also labels the actor's conduct as less reprehensible in comparison with the same result brought about intentionally. If intention did not apply to foreseen side-effects, the actor may be punished and stigmatised less severely than he deserves.[15]

2.3.2. Awareness of a risk

Like the other forms of intent, dolus eventualis consists of a cognitive and a volitional element, albeit in a diluted form when compared with (in)direct intent. The cognitive element is the awareness of a risk and the volitional element is taking the risk for granted. Although the concept is almost identical in Dutch and German law, the interpretation of the first criterion of being aware of a risk differs. Whereas in German law, the defendant only needs to be aware of a(ny) possible chance that the risk may materialise, the degree of this risk must be *considerable* in Dutch law. Chances that are empirically not likely to occur are not relevant for dolus eventualis.

The relevance of this difference can be illustrated in the highly debated context of having unprotected sexual intercourse. These so-called HIV cases have resulted in defendants being charged with the intentional infliction of serious bodily injury,[16] and judgments on just how likely the consequence of infection must be in order to accept conditional intent. The conclusion that can be drawn from Dutch case law is that unprotected sexual intercourse only brings about a considerable chance under 'certain risk-increasing circumstances'.[17] The Dutch Supreme

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[15] S.I. Politof and F.A.J. Koopmans, 'Schuld' (Gouda Quint 1991), p. 135.

[16] The charge of (attempted) intentional killing is not deemed appropriate to these cases. In the Netherlands, this is accepted as evident, but in Germany, the question whether HIV infection constitutes killing or inflicting bodily injury has been fiercely debated. See e.g.: C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 476–477.

[17] HR 18 January 2005, NJ 2005, 154.

Court seems, however, quite reluctant to recognise these specific circumstances. As a result, no HIV-positive person has ever been convicted for inflicting (or attempting to inflict) bodily injury (Article 302 DCC) via unprotected sexual intercourse. A pertinent example can be found in the following decision where the Dutch Supreme Court quashed a conviction of a man who infected his partner by having unprotected sex while knowing he was HIV positive.

Dutch Supreme Court, 20 February 2007, NJ 2007, 313

'3.2. The conviction is based on the following evidence: [...]

b. an official report of the magistrate, containing the statement of [victim]: "From April to September 1997 I have not had sex with another man than with [defendant]. In the beginning of our relationship [defendant] and I have had protected anal intercourse, but we have resorted to unprotected contact. I think about two to two and a half months after the beginning of the relationship. The initiative came from [defendant]. He told me that he was HIV negative, and that he has repeated on several occasions, even in the presence of friends and my parents. I told him that I was HIV negative too, and since then we have not used condoms together."

[...]

i. a copy of the judgment of the Supreme Court of 18 January 2005, No 02659/03, insofar as it contains the statement made on 16 January 2003 by Prof. S.A. Danner: "In genital-anal contact the chance of infection (with the HIV virus; court) is greater than in genital-vaginal contact. The anus is not built for sexual intercourse, so that genital-anal intercourse is more likely to result in micro-traumatica (sores) that bleed. Blood contains a large amount of HIV particles. This makes the risk of infection in genital-anal contacts bigger. The risk of infection is 1 in 200 to 300 per sexual act. The risk of infection is one and a half to two times greater in case the person infected with HIV is penetrating the other anally, than vice versa. In the medical world, the risk of infection of 1 in 200–300 is considered high."

[...]

4.3. It is true that the evidence suggests that by acting as he did, the accused brought about the danger that the victim would be infected with the HIV virus, which risk has also materialised, but it cannot be inferred from the evidence or the considerations of the Court of Appeal that there was such a considerable risk of contamination that *dolus eventualis* in a case such as this may be accepted.

4.4. In the consideration above, the Court of Appeal was first of all wrong to take into account the circumstance that the suspect knowingly lied to his partner. This may be important for answering the question whether the defendant consciously accepted the risk that he would infect his partner with the HIV virus, but not for determining the size of that risk. The Court has also made use of statistical data on the probability of realisation of this risk, which are considered significant in the medical world. However, given the reluctance that – also from the point of view of the ministers [of Health and Justice] concerned [...] – in connection with public health interests [...] should be exercised in accepting criminal liability for endangering conduct such as in this case, that data has

> insufficient weight to establish on that basis that the risk is considerable in cases like the present as required for *dolus eventualis*. The circumstance that the defendant and his partner have had frequent sexual contacts, as the Court has held, may be regarded as increasing the aforementioned risks, but cannot be regarded as a special risk-increasing circumstance […].'

In sharp contrast, in Germany, a person who knows he or she is HIV positive and does not use a condom when having sex is said to have consciously taken for granted the risk that his or her partner would be infected. As a result, that person can be convicted for inflicting serious bodily injury (§223 GCC), or attempting to do so, if no infection followed. In a case before the Supreme Court of 4 November 1988, the defendant, who knew he was HIV positive, did not comply with the repeated advice of his doctor and psychiatrist to use condoms and had unprotected sexual intercourse on at least two different occasions with a man. The defendant submitted he had not used a condom when he was receiving oral sex, but that he did in fact use a condom when he anally penetrated the victim until he ejaculated. On a subsequent occasion, he tried to have unprotected anal intercourse, but stopped because this hurt, and then continued whilst using a condom received from the victim.

The Supreme Court approved of the conviction of the District Court for intentional infliction of serious bodily harm. It held that the Court was correct to hold that any of the acts was capable of infecting the victim. Even if the virus was particularly strong in blood and semen, and the risk of infection bigger with anal intercourse, the virus could also be transmitted by one-off oral sexual intercourse.

> **German Supreme Court, 4 November 1988, BGHSt 36, 1**
>
> 'Even though there is still no scientific clarity about the precise physiological mechanisms for the transmission of HIV or about the statistical probability of becoming infected as a consequence of one-off unprotected sexual intercourse with an infected partner or the extent to which this is reduced if there is no ejaculation. But it is assured that any unprotected – oral, anal or vaginal – sexual intercourse is capable of infecting the partner. […] Oral intercourse is less, anal intercourse especially dangerous. Termination prior to ejaculation reduces the risk but does not eliminate it.'

In the context of HIV infection, this means that a small chance of infection is still unreasonable to take, given the great harm that may result from infection and the easy way to almost neutralise this risk by using a condom. Other convictions have followed since then, including the quite recent conviction in 2010 of former No Angels singer Nadja Benaissa, who received a two-year suspended sentence for having unprotected sexual intercourse whilst knowing she is HIV positive.[18]

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[18] Süddeutsche Zeitung, 17 August 2010.

The above demonstrates that the threshold of the risk in conditional intent is indeed much lower in Germany than in the Netherlands. However, we need to be careful when inferring general conclusions from the context of HIV, as criminal policy reasoning may always play an important role in determining conditional intent. For example, it is very interesting that in the above-mentioned Dutch case there is an express consideration in the judgment on the political reluctance to criminalise the (possibility of) HIV infection. This may suggest that the Supreme Court did not want to establish liability in these HIV cases. In other words, although these cases clearly illustrate the difference in the two versions of conditional intent, one should keep in mind that the outcome of these decisions are very much related to the specific context of HIV and unprotected sex.

It should therefore not be concluded that the lower threshold on the risk automatically leads to a finding of conditional intent in more cases in Germany. In fact, rather the opposite seems to be the case. Amongst others, this is because of the relationship between the degree of risk and the acceptance, the second criterion of dolus eventualis. The low probability is often seen by German courts as an evidential indication that the actor did not accept the consequences occurring. The less likely a result was to occur, the more likely a court will therefore decide that the defendant did not accept this possibility.[19] This can be illustrated in cases where a driver of a vehicle is ordered to stop by a police officer, but he refuses and continues to drive, whereby the officer has to jump aside to escape collision with the vehicle. German courts have argued that the defendants bank on the reaction of the policeman. They accept endangering them, but they do not actually contemplate that they will be killed. The defendants are thought to have considered the chance of death as improbable, as the defendant trusts the officer expects such actions and is mentally prepared to jump, which is confirmed by the fact that these situations hardly ever lead to fatal results. There is therefore no acceptance of death and no liability based on conditional intent.[20] In short, the awareness of only a small chance suggests the accused did not accept the death of the officer.

2.3.3. *Acceptance of the risk*

Next to awareness of the risk, dolus eventualis requires that the defendant accepted the possibility that the risk may occur. This volitional element distinguishes dolus from culpa or negligence. It is therefore negated when the actor sincerely believed the risk would not materialise, in which case only conscious negligence exists.[21]

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[19] T. Fisher (ed.), 'Strafgesetzbuch und Nebengesetze' (C.H. Beck Verlag 2009), p. 107; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2014), §15 Rn. 85–87b.

[20] M. Bohlander, 'Principles of German Criminal law' (Hart Publishing 2009), pp. 65–66; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 467 and 471; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar'(C.H. Beck Verlag 2014), §15 Rn. 85–87b. For example, 21 November 1995 BGH NStZ-RR 1996, 97. It should be noted that these drivers could be held liable for violating §§315b or 315c GCC, which is punishable by up to ten years of imprisonment.

The exact extent to which the defendant must have accepted the risk is expressed in numerous ways. The German courts use often the following terms: 'approve',[22] 'accept the result and approve it',[23] 'taking into the bargain' and 'acquiescence'.[24] In the Netherlands, the courts often use the wordings '(conscious) acceptance'[25] or 'taking the consequences into the bargain'.[26]

All these different terms give the same basic message: the actor must either endorse the result or at least come to terms with it for the sake of the desired goal.[27] A German case that illustrates the acceptance criterion very well is the so-called *Leather Belt* case.[28] Two persons intended to steal the victim's money and in order to avoid his resistance they tried to drug him first. However, this method did not work. Hence they decided to strangle him with a leather belt, until he could not move anymore, in order to prevent him fighting back. While doing so, they realised that the victim could be strangled to death. This insight appeared unpleasant to them; however, they wanted to 'put him out of action' at all costs.[29] The German Supreme Court affirmed their conditional intent to kill and ruled that dolus eventualis requires that the offender 'foresees' the consequences 'as possible' (*für möglich halten*) and 'approves them' (*billigen*).[30] The Supreme Court decided that both perpetrators accepted the fact that the victim could die while strangling him and therefore approved this result.

It may sometimes be difficult to prove the volitional element because it concerns an inner disposition of the actor, which is mostly hidden from us. In order to avoid dealing with such complicated psychological processes, courts therefore prefer to focus on the 'externalisation of the presumed will'.[31] From conduct under certain circumstances and through rules of general experience, it is inferred what the defendant thought and wanted.[32] If the accused argues that he trusted in a good outcome, the credibility of that submission will be tested by reference to objective facts and circumstances. Eventualis is still accepted if the objective circumstances indicate that it is more than probable that he did accept the possibility that the risk would occur.[33]

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[21] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 457–459; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2014), §15 Rn. 85–87b.

[22] 'Billigen', see: 6 June 1952, BGHSt 3, 105.

[23] 'Billigend in Kauf nehmen' is the common term for the BGH. See for example: 2 August 2009 BGH BeckRS 2009, 25029.

[24] 'Sich damit abfinden', see: 4 November 1998 BGHSt 36, 1. For most German terms, see: V. Krey, 'German Criminal Law – General Part – Volume II – Legal Elements of the Intentional Offence Committed by Action' (Verlag W. Kohlhammer 2003), pp. 116–221.

[25] HR 20 February 2007, NJ 2007, 313.

[26] Compare 'op de koop toenemen' in HR 15 October 1996, NJ 1997, 199 with 'billigend in Kauf nehmen'.

[27] M.E. Badar, 'Mens Rea – Mistake of Law & Mistake of Fact in German Criminal Law: A survey for International Criminal Tribunals' International Criminal Law Review (2005), pp. 232–234.

[28] BGHSt 7, 363.

[29] M.E. Badar, 'Mens Rea – Mistake of Law & Mistake of Fact in German Criminal Law: A survey for International Criminal Tribunals' International Criminal Law Review (2005), p. 227.

[30] BGHSt 7, 368–370.

This so-called 'objective' approach is hardly controversial in cases where the probability of the risk occurring was quite considerable. If conduct is so serious and death can be the only consequence, acceptance of the risk is easily assumed. For example, the defendant threw a hatchet with full force through a glass door at a police officer standing only five metres away from him.[34] The fact that it is clear to anybody that this has a lethal risk is enough to infer that the defendant knew this too, after which it is easily accepted that since he acted in that way, he took this risk for granted.[35]

However, even in such cases, the volitional element can still be negated when there are contra-indications, i.e. circumstances indicating that the defendant did *not* accept the consequences.[36] An example of such a contra-indication in Dutch case law is the danger to the actor himself. In a case where the defendant had driven very dangerously in a Porsche, which resulted in a lethal accident, it was held that if he had accepted the consequences of causing a collision, he would also have accepted the possibility of being killed himself. This was held to be unlikely, all the so more because the defendant had aborted some of the dangerous overtaking manoeuvres before causing the fatal one.[37] In other cases of dangerous driving, conditional intent has been accepted in the absence of conduct that indicated the will to avoid a collision, like aborting overtaking manoeuvres.[38]

German courts also operate with a contra-indication of the volitional element related to fatal consequences. However, this relates to the death of the victims, not to the possibility that the defendant might also die himself.[39] If a risk materialised into lethal consequences, there is a presumption that the defendant did not take these fatalities for granted, based on the assumed aversion of humans against killing other humans. It also operates in cases where the defendant inflicted serious injuries upon the victim and is charged with attempting to kill the victim. Only in cases of really extremely violent acts will the German Supreme Court allow an inference of intent to kill from these dangerous acts.[40]

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[31] A.A. Van Dijk, 'Strafrechtelijke aansprakelijkheid heroverwogen' (Maklu 2008), p. 234.

[32] HR 25 March 2003, NJ 2003, 522; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 238.

[33] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 67.

[34] 16 July 1980 BGH NStZ 1981, 22.

[35] D.H. De Jong and G. Knigge, 'Het materiële strafrecht' (Gouda Quint 2003), pp. 104–107.

[36] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 284.

[37] HR 15 October 1996, NJ 1997, 199.

[38] HR 5 December 2006, NJ 2006, 663; HR 23 January 2000, NJ 2001, 327; and HR 10 February 2009, NJ 2009, 111.

[39] 22 August 1996 BGHSt 42, 235.

An interesting example of how the threshold is applied can be found in a case in which the victim, for the purpose of sexual gratification, had requested to be tied to a bed, have gasoline poured over him and asked the accused to ignite a lighter. At one point, the gasoline caught on fire and the victim burned to death. The District Court was not convinced that the volitional element was fulfilled but was remanded for requiring too much. The Supreme Court held that the acceptance requirement was already fulfilled by the statement of the defendant that she was happy that nothing happened the first times she ignited the lighter. If the actor acts despite knowing the great risk, extremely dangerous conduct makes it obvious that he or she took the occurrence of the result into the bargain, leaving the outcome to chance. The mere hope that nothing would happen cannot negate the 'acceptance' of the result.[41] This decision strengthens the argument that the likelihood that the result will occur is paramount. The threshold therefore applies especially to those cases where the violence was not so extreme as to leave open the possibility of trusting in a non-lethal outcome.[42]

2.4. RECKLESSNESS

The English concept of recklessness has a similar function to dolus eventualis. As a middle ground of fault between intent and negligence, it enables a more serious kind of criminal liability in cases that would otherwise be labelled as mere negligence. However, an important difference is that recklessness constitutes a separate form of fault, whereas dolus eventualis is merely seen as the lowest degree of intent.

Since recklessness is not a type of dolus, it does not serve the purpose of facilitating the proof of intentional offences. The lack of dolus eventualis in English law leads to a stricter concept of intent and thereby stricter concepts of attempt, participation and so on. Nevertheless, many offences cannot only be committed intentionally, but also recklessly. For example, the offence of inflicting grievous bodily injury can be committed intentionally (section 18 of the Offences against the Person Act 1861) as well as recklessly (section 20 of that Act). The difference with applying dolus eventualis is therefore that the reckless actor is labelled and punished differently. The reckless actor is, all other circumstances being equal, generally considered to be less culpable than the intentional actor. This is therefore also generally expressed in the maximum sentence that can be imposed on him.

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[40] Like in 2 August 2009 BGH BeckRS 2009, 25029 and 25 March 2010 BGH NStZ 2010, 515.

[41] 20 June BGH NStZ 2000, 583.

[42] C. Gatzweiler, 'Rechtsvergleichende Untersuchung zur Unterscheidung von Vorsatz und Fahrlässigkeit in Spanien, Mexiko, Argentinien, Kolumbien und Deutschland' (Shaker Verlag 2008), pp. 143–144.

2.4.1. *A subjective test*

Recklessness can be generally defined as the conscious taking of an unreasonable risk. In contrast to dolus eventualis, recklessness does not require that the defendant takes the risk for granted. It only needs to be proven that the defendant was aware of a risk that is, in the circumstances known to him, unreasonable to take. Whereas dolus eventualis focuses on the attitude of the defendant, recklessness focuses on his awareness, on what he knew.

The current legal definition of recklessness involves a subjective test, which was only affirmed in 2003 in the case of *R v G and another*.[43] This landmark decision overruled the interpretation of recklessness as objective or inadvertent recklessness, which was dominant since the *Metropolitan Police Commission v Caldwell* case of 1982. Let us first give some attention to this type of recklessness, because it helps us to understand why the current subjective definition encompasses less culpability than (conditional) intent but more than (unconscious) negligence.

2.4.1.1. *Caldwell* recklessness

Before *Caldwell*, the leading case on recklessness was *R v Cunningham* of 1957.[44] In that case the defendant broke a gas meter to steal money from it, and the gas seeped out into the house next door, where Cunningham's prospective mother-in-law was sleeping. She became so ill that her life was endangered.[45] Cunningham was charged under section 23 of the Offences against the Person Act 1861 with 'maliciously administering a noxious thing so as to endanger life'. The Court of Appeal said that 'maliciously' means intentionally or recklessly and defined recklessness as follows: 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it.' This is clearly a subjective test.

In the *Caldwell* case the House of Lords decided to use an objective definition of recklessness. Caldwell was an ex-employee of a hotel and nursed a grudge against its owner. He started a fire in the hotel, which caused some damage, and was charged with arson, an offence defined in the Criminal Damage Act 1971 as requiring either intention or recklessness. On the facts there was no intention, and regarding recklessness Lord Diplock stated that '"reckless" as used in the

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[43] R v G and another [2003] UKHL 50.

[44] R v Cunningham [1957] 2 All ER 412.

[45] C. Elliot and F. Quin, 'Criminal Law' (Pearson Education Limited 2010), p. 18.

[…] definition of mens rea […] is an ordinary English word' and should therefore not only be limited to the *Cunningham* meaning. It also includes failing to give any thought to whether or not there is any such risk. An objective test was introduced. The definition of recklessness extended not only to awareness of the risk but also to failure to foresee an obvious risk.[46] The defendant 'either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.'[47] Thus, being reckless did not merely mean being aware of a risk and taking it, but also taking a risk without thinking of the consequences.

The *Caldwell* recklessness test became the standard for over twenty years. However, this purely objective test blurred the distinction between recklessness and negligence. Before *Caldwell* there was a clear difference: recklessness is the conscious taking of a risk which implies awareness of the risk; negligence traditionally meant unconsciously taking a risk of which one should have been aware. Now, the *Caldwell* test seemed to also encompass negligence, making the definition of recklessness over-inclusive.

On the other hand, the objective test was also under-inclusive as it created a loophole in the law. *Caldwell* recklessness encompasses two different situations. A person acts recklessly when he either realises there is a risk and takes it anyway, or when he fails to see a risk that, by the objective standard of a reasonable man, he ought to have seen. It does not deal, however, with the person who thinks of possible consequences, but concludes that there are none and continues to act. In such a situation, the defendant would only be deemed to be negligent.[48] Consider the person who builds a campfire and notices that the fire might spread to a nearby tent if he does not remove some loose dry grass next to the fire. He takes the necessary precautions and removes the grass, but inadvertently falls short of what was required: not all of the grass is removed and later the fire does spread, burning down the tent.[49] The loophole was criticised for excluding from recklessness the person who stupidly rejects a risk, but including the person who stupidly never thinks about it.

2.4.1.2. *R v G* recklessness

The *Caldwell* recklessness was rejected in 2003 in *R v G and another*. In this case, the two defendants, aged 11 and 12, set fire to some newspapers and then put a large wheelie-bin over the fire. They did not contemplate that the bin would catch fire and eventually lead to the burning down of a shop. The House of Lords decided that the lack of awareness negated the charge of recklessly damaging property, thereby overruling *Caldwell* and favouring the definition of recklessness provided by the Law Commission's Draft Criminal Code Bill in 1989:

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[46] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 180.

[47] R v Caldwell [1982] 1 All ER 961.

[48] R v Reid [1992] 95 Cr App R 291; D. Ormerod and K. Laird, 'Smith & Hogan: Criminal Law' (Oxford University Press 2015), p. 159.

[49] W.J. Winslade, 'Brady on Recklessness' Analysis (1972), p. 32.

> 'A person acts recklessly [...] with respect to –
> (i) A circumstance when he is aware of a risk that it exists or will exist;
> (ii) A result when he is aware of a risk that it will occur;
> and it is, in the circumstances known to him, unreasonable to take the risk.'

In making clear that recklessness requires awareness, the difference with negligence is very clear again. Recklessness and culpa both revolve around the taking of unreasonable risks.[50] The reckless actor is aware of the risk he has taken, whereas the negligent actor is unaware of the risk he created, although he should have and could have known. Awareness is the clear dividing line; there is no room for concepts like conscious negligence in English law. Recklessness thus brings about a narrower concept of culpa, namely inadvertent negligence.

The main rationale for requiring awareness for recklessness is that risky action is only morally significant if the defendant acted knowing the risk.[51] Lack of background knowledge, ignorance, stupidity and gullibility are not the type of vices that can ground recklessness.[52] However, like the requirement of awareness in dolus eventualis, this requirement of recklessness does not necessarily present evidential difficulties in practice, since it can be inferred from objective facts and circumstances.

2.4.2. *An unreasonable risk*

The defendant needs to be aware of a risk that is, in the circumstances known to him, *unreasonable* to take. In short, this requires that the defendant needs to be aware of any degree of risk. In addition, however, this risk objectively needs to be unreasonable.[53] Thus, the defendant's awareness need not relate to the unreasonableness of the risk. Whether this risk is in fact unreasonable is assessed objectively, independent of the evaluation of the defendant. The question is whether a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk.[54]

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[50] T. Weigend, 'Zwischen Vorsatz und Fahrlässigkeit' Zeitschrift für die gesamte Strafrechtswissenschaft (1981), pp. 676–677.

[51] A. Duff, 'Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law' (Basil Blackwell Ltd 1990), pp. 142 and 153.

[52] V. Tadross, 'The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder' Criminal Law Review (2005), pp. 250–255.

[53] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 140; A. Duff, 'Intention, Agency and Criminal Laibility: Philosophy of Action and the Criminal Law' (Basil Blackwell Ltd 1990), p. 143.

The risks that are relevant for recklessness are assessed normatively, which means that the relevance of a risk is not only judged according to the likelihood of its occurrence, but also to the social utility of the act relative to the nature and extent of the harm that is caused when the risk occurs. In other words, a small chance of great harm can be a relevant risk.[55] The more valuable a legal interest is, the sooner a risk becomes relevant.

The opposite is of course also true. The risk can be reasonable if the actor furthers a good cause. We take risks all the time, often even professionally. Driving a vehicle or operating an industrial machine in compliance with the pertinent rules may cause unwanted side-effects, but when they occur, this does not make us reckless.[56] The taking into account of these normative factors also explains why there is no need for a threshold of probability, like in most civil law systems.[57] Thus, in contrast to the Dutch concept of dolus eventualis, the risk in recklessness need not be considerable.

2.4.3. Recklessness in HIV cases

The criteria for recklessness may be further illustrated if we reconsider cases of HIV infection. The above-mentioned scenarios of HIV infection lead to liability for recklessness in England.[58] Even if the chance of infection is small, the harm caused is very serious and the risk taken therefore unreasonable. Moreover, there is no social utility in having unprotected instead of protected sexual intercourse. This normative approach explains why the chance of infecting someone with HIV need not be considerable to infer recklessness.[59] As a result, defendants have tried to avoid liability by arguing that their partners, by consenting to unprotected sexual intercourse, also consented to the risk of HIV infection. This has however been consistently rejected. A pertinent example can be found in the *Konzani* case. Konzani, of Malawian nationality, had lived in the UK for several years when he was convicted of recklessly transmitting HIV to three different female partners. Konzani admitted he had acted recklessly, but he wished to rely on the defence of consent.

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[54] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 140.

[55] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 176.

[56] T. Weigend, 'Comments on Jeroen Blomsma's Case of Recklessness', in A. Klip (ed.), Substantive Criminal Law of the European Union (Intersentia 2011), p. 164.

[57] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 129–131.

[58] R v Dica [2004] EWCA Crim 1103.

[59] For attempt, recklessness is insufficient. In contrast to German and Dutch law, there can thus be no liability if no infection occurred.

R v Konzani [2005] EWCA Crim 706

> 'The prosecution did not seek to prove that the disease was deliberately transmitted, with the intention required by s 18 of the 1861 Act. The allegation was that the appellant behaved recklessly on the basis that knowing that he was suffering from the HIV virus, and its consequences, and knowing the risks of its transmission to a sexual partner, he concealed his condition from the complainants, leaving them ignorant of it. When sexual intercourse occurred these complainants were ignorant of his condition. So although they consented to sexual intercourse, they did not consent to the transmission of the HIV virus. Dica[60] analysed two different sets of assumed facts arising from the issue of the complainants' consent, by distinguishing between the legal consequences if, as they alleged, the truth of his condition was concealed from his sexual partners by Dica, and the case that he would have developed at trial if he had not been prevented from doing so by the judge's ruling, that far from concealing his condition from the complainants, he expressly informed them of it, and they, knowing of his condition because he had told them of it, consented to unprotected sexual intercourse with him. There is a critical distinction between taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease. [...] If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant.'

A more far-reaching case is *R v Adaye* from 2004, unfortunately unreported, which raises the question of how much awareness is actually required in recklessness. The defendant was convicted for infecting his sexual partner by having unprotected vaginal intercourse. The defendant did not know he was infected with HIV, but the Court found it sufficient that he was aware of a higher risk of infection, since his wife had informed him that she was HIV positive. The knowledge required for reckless HIV infection is thus not only actual knowledge of being HIV positive, but also knowledge that one may be infected.[61] The Court acknowledges that it must be about a high risk of being infected. If not, everyone who cannot rule out they are not HIV positive could be held to be reckless.

What matters is the concrete situation of the defendant. It mattered that Adaye had been having sex with his HIV-positive wife for years and never took a test since he had been told she had the disease. If he had been acquitted, this could have discouraged others from getting a HIV test, thinking they would be safe as long they were not formally informed they were infected. Adaye was therefore not held liable for mere knowledge of possible infection, but for shutting his eyes to the obvious.

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[60] In R v Dica [2004] EWCA Crim 1103 it was already decided that consent to intercourse does not automatically amount to consent to the risk of HIV infection.

[61] S. Ryan, 'Risk-taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' The Liverpool Law Review (2007), pp. 219–220.

Nonetheless, the broad concept of awareness remains problematic. Should a prostitute also be held liable? A man who leads a dissolute life? At what point should suspicion or fear be considered awareness? The line between awareness and negligence risks being blurred. It equates the person who actually knew about the risk he took with the person who was unsure of the risk in the first place. In addition, if awareness of any chance of harm occurring would suffice to hold a person liable, the scope of liability may become very wide. That is why in legal systems that accept conditional intent, particularly in German law, much emphasis is put on the attitude of the perpetrator. Dolus eventualis is not only about being aware of the risks; the perpetrator must have also taken it for granted or have been at least indifferent about whether they will occur or not. In most continental legal systems, that attitude is the decisive threshold of intention. The lower limit is not the concept of risk, but the attitude of the perpetrator towards that risk.

2.5. NEGLIGENCE OR CULPA

Negligence or culpa is the least serious fault element in all legal systems. In German law it is even explicitly stipulated that negligence does not carry criminal liability unless a particular provision provides for its punishment. This is clear from the words of §15 GCC which provides that 'only intentional acts are punishable, unless the law expressly threatens negligent acts with punishment.'[62]

Negligence is undoubtedly the most normative form of mens rea and is primarily based upon a violation of the required duty of care that causes a result prohibited by criminal law.[63] Comparatively speaking, most civil law systems distinguish between two forms of culpa, namely conscious and unconscious negligence. Conscious negligence exists where the actor foresees a possibility of a consequence resulting from his conduct, but wrongfully relies on the idea that the result would not occur. In case of unconscious negligence, the actor, because of a lack of care, wrongfully does not consider the consequences of his conduct.[64]

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[62] This rule allows the legislator to simplify the code by omitting specific references to intentional conduct. Consequently, where a provision is silent on the fault element, it would be read as requiring intentional conduct (see e.g.: the manslaughter provision §212 GCC). M.E. Badar, 'Mens Rea – Mistake of Law & Mistake of Fact in German Criminal Law: A survey for International Criminal Tribunals' International Criminal Law Review (2005), p. 232.

[63] A.A. Van Dijk, 'Strafrechtelijke aansprakelijkheid heroverwogen' (Maklu 2008), pp. 54–55 and 61–62; V. Krey, 'German Criminal Law – General Part – Volume I – Basics' (Verlag W. Kohlhammer 2002), pp. 142–143.

By contrast, since English law already accepts recklessness as a third fault element, and distinguishes recklessness from negligence by awareness of the risk, it does not recognise conscious negligence. Negligence in England is always unconscious or inadvertent negligence. It is interesting to note that negligence offences are not that popular in the English system, the main exception being the offence of gross negligence manslaughter. Not even five per cent of all offences are crimes of negligence, while on the continent most intentional offences have a negligent counterpart.[65] In the traditional English view negligence is not even considered a genuine form of mens rea, i.e. a cognitive (subjective) state of mind, but is rather a failure to comply with a standard of conduct.[66] This perspective however fails to recognise that in 'state of minds' like recklessness, normative questions also play an important role.[67] In Germany and the Netherlands, negligence is much more popular because these legal systems only operate with two kinds of mens rea. If intent cannot be proven, negligence functions as a safety net. As discussed, in England there is less need for negligence liability due to the concept of recklessness covering cases that are labelled as conscious negligence on the continent.

2.5.1. *Conscious negligence*

The mens rea for the perpetrator who is aware of a risk, but does not take this for granted, is called conscious negligence in most continental legal systems. The perpetrator is conscious of the risk, but trusts in a good outcome. He does not take it for granted, but thinks everything will be all right. In other words, the main difference between dolus eventualis and conscious negligence is related to the attitude of the actor.[68] While both concepts involve foresight, conditional intent can only be present when the actor has reconciled himself with the result. To determine dolus eventualis the question is whether the actor foresaw and accepted the possibility in the bargain. For conscious negligence, the question becomes whether he foresaw the result ensuing (subjective test) and if a reasonable man would have accepted that possibility (objective test). The above-mentioned case of the German Supreme Court of 4 November 1988 sums up the difference very well:

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[64] M.E. Badar, 'Mens Rea – Mistake of Law & Mistake of Fact in German Criminal Law: A survey for International Criminal Tribunals' International Criminal Law Review (2005), p. 233; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 262–263.

[65] A.J. Ashworth and M. Blake, 'The Presumption of Innocence in English Criminal Law' Criminal Law Review (1996), p. 308. See also: Chapter IV on Actus Reus and Mens Rea.

[66] A.J. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 175–176; D. Ormerod and K. Laird, 'Smith & Hogan: Criminal Law' (Oxford University Press 2015), p. 121.

[67] G.P. Fletcher, 'The Grammar of Criminal Law – American, Comparative and International – Volume One: Foundations' (Oxford University Press 2007), p. 102.

[68] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 235–242.

> 'According to settled case law of the Supreme Court on the distinction between *dolus eventualis* and conscious negligence, the perpetrator acted intentionally when he recognised as possible and not entirely unlikely that the consequence as specified in the offence definition would occur and agrees with this in the manner that he accepts the consequence and approves of it, or, for the sake of the desired goal, at least comes to terms with it, even if he did not desire the occurrence of the consequence; conscious negligence, on the other hand, exists when the perpetrator does not agree with the materialisation of the offence element he recognised as possible and seriously – not just vaguely – trusts that this offence element will not materialise.
>
> [...]
>
> Given the now widespread knowledge about the risk of infection from unprotected sexual encounters, it is reasonable to assume that in a case such as this one, the perpetrator recognises the possibility of infecting his partner and, that if he continues anyway, he accepts the concomitant danger and approves of it, or, in order to satisfy his sexual urges, at least comes to terms with its materialisation.'

The volitional element is therefore essential in legal systems such as the German and Dutch ones, because it demarcates intention from the lesser mens rea of negligence. In cases where the risk did not materialise, the distinction is even more important, as intention is required for attempt liability. Thus, if the defendant did not take the risk for granted and it also did not occur, there can be no attempt liability.

2.5.2. *Unconscious negligence*

Since English law distinguishes recklessness from negligence by awareness, it only accepts inadvertent negligence, i.e. a culpable failure to be aware of the unreasonable risk entailed in one's conduct. This unconscious negligence makes up for the least serious kind of mens rea in most other legal systems too. In order to find negligence, the actor should have been able to foresee that the offence would be fulfilled by his carelessness.[69] Generally, this is inferred from the violation of a duty of care. Detailed codes of conduct have been established, either legally binding or not, for almost every type of behaviour, with a view to prevent certain harm or danger. This facilitates the assumption that the violation of such a duty makes it foreseeable that the harm would occur. However, debate remains possible in cases of simple violations. For instance, does exceeding the speed limit make an accident foreseeable?

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[69] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 264–266.

In comparison with intention and foresight, inadvertent negligence considerably extends the scope of criminal liability. It does not need to be proven that the defendant was aware of the risks of his conduct. The extension helps to convict not only those who deny they were aware, which cannot be disproven without reasonable doubt, but also those who were truly ignorant. Negligence liability may be specifically warranted in a professional context, where a person's carelessness can lead to very serious harm to many people. If maintenance on a nuclear reactor is not carried out appropriately and in a timely manner, any problems as a result of this may have catastrophic consequences. On the other hand, people take risks all day, every day. By driving a car, we run the risks of making errors and causing harm. If the mere occurrence of the harm would bring about punishment, we would possibly do nothing at all. Everyday life would be crippled. In order to strike a balance, negligence is limited in a number of ways.

First of all, the negligent defendant is not punished because he was unaware of the risks of his conduct, but because he *should* and *could* have been aware of those risks. Inadvertent negligence is therefore distinguished into an objective and a subjective part.[70] The objective part includes the breach of a duty of care and its causal connection to the consequence. If it is established that the actor breached this duty, he is generally considered to have been careless. The subjective part is therefore better seen as an exceptional criterion that can negate culpa if it appears that this particular defendant, given his capacities, could not meet the required standard of care.[71] Consider the defendant who exceeded the allowed amount of a certain substance in his product. As a result of this breach of duty, he caused injuries to consumers that are attributed to him under negligence. The subjective part is only absent by exception and therefore generally assumed. In order to escape liability the defendant himself will have to make plausible that he did everything that could be reasonably expected of him.

This brings us to the second limitation: negligence is only about taking unreasonable risks. This means that the required nature and degree of care that the defendant should have taken is established by reference to what can be expected from a sensible and conscientious person, taking into account the concrete circumstances and the social role of the actor.[72] Individual characteristics that are taken into account to determine what degree of diligence could be expected from the defendant are, amongst other things, his professional position, role, education and age. A professional is judged according to what a general person in that profession would do. For example, what could be expected from a reasonable doctor, building inspector or constructor?[73] When the actor enters into special situations, accepts a function or takes part in traffic or sports, he must abide by the applicable rules and is considered to be competent to carry out the activity. He gives guarantees, on which others may rely. This '*Garantenstellung*' concretises the standard person to which the defendant is compared.

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[70] A.A. van Dijk, 'Strafrechtelijke aansprakelijkheid heroverwogen' (Maklu 2008), p. 39; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 162 and 296.

[71] J. Blomsma, '*Mens rea* and defences in European criminal law' (Intersentia 2012), pp. 174–175.

[72] 1 February 2005 BGH NStZ 2005, 446; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 300.

Finally, the degree of carelessness must be gross. Only that degree of carelessness may be punished that falls substantially short of the standard of what can be expected of someone.[74] In other words, culpa lata (gross negligence) is contrasted with mere culpa levis (light negligence), which is sufficient for civil but insufficient for criminal liability.[75] Requiring mere culpa levis implies that any shortcoming of the accused is sufficient. The actor would then be compared to the most able, thoughtful and careful person. In contrast, the defendant is compared to the reasonable or normal person modified by the concrete circumstances and the social role of the actor.[76] Culpa should be limited to prevent fears expressed towards negligence liability from being realised, for example that negligence liability can be imposed on all, even the law-abiding citizen, and secondly, that it can be imposed on everyone at least once. Human faults are inevitable, but gross carelessness not.[77]

These conditions can be illustrated in the case dealt with by the Dutch Supreme Court on 14 November 2000, where the defendant was an intern working in a pharmacy under the supervision of a pharmacist. When preparing medicines on the basis of a recipe, she had made the mistake of adding methadone to capsules instead of cellulose. As a result of taking these pills, one person died and two others sustained serious bodily injury. The intern was tried and convicted for negligently causing death and serious bodily injury.

Dutch Supreme Court, 14 November 2000, NJ 2001, 37

"The Court of Appeal considered under the heading "Considerations regarding evidence":

(i) that a significant degree of attention may be required from any person working in a pharmacy, given the risks to health involved in the pursuit of these activities;

(ii) that this also applies to any person who works in a pharmacy in the context of a training; and

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[73] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 265.

[74] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 152.

[75] A. Schönke and H. Schröder 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 323–324; D.H. de Jong, 'Onbewuste schuld – Een probleem bij de kwalificatie of bij de straftoemeting?' (Kluwer 2007), p. 3.

[76] J. Blomsma, '*Mens rea* and defences in European criminal law' (Intersentia 2012), p. 191.

[77] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 323.

> (iii) that the difference in size between the pots of cellulose and methadone – as the Court has observed – is considerable and that the pot of methadone also has a red dot to draw attention to the dangerous nature of the substance; and
>
> (iv) that, in view of these circumstances, the accused did not meet the required level of mindfulness and alertness.'

During the preparation of the pills, the intern had noticed a difference in weight and had asked the assistant whether she should start over, upon which the assistant had said that that was not necessary. She said these differences in weight were common and that she should just add some more filler. The defendant's lawyer aimed to negate his client's negligence by pointing out this permission to continue. However, the Court of Appeal rejected this plea, referring to the preceding carelessness of the intern in taking the wrong jar. The Supreme Court upheld the conviction of the intern, confirming that this does not affect the judgment shown in the cited paragraph that the defendant acted very carelessly by taking the wrong pot and using its contents.

3. DEMARCATION FROM PREMEDITATION AND MOTIVE

Having compared the different forms of mens rea, it should be noted that some offence definitions contain more subjective elements than the fault elements of intention, recklessness and/or negligence. These elements usually do not constitute liability, but either aggravate (or sometimes mitigate) the reproach and the sentencing range. We may illustrate this by referring to the Dutch homicide provisions, where the element of 'premeditation' is used as an aggravating circumstance of manslaughter. Article 287 DCC defines intentional manslaughter (*doodslag*) as follows:

> 'He who intentionally takes the life of another is, as guilty of manslaughter, punished by a term of imprisonment of not more than fifteen years or a fine of the fifth category.'

However, Article 289 DCC defines the most serious form of intentional killing as murder (*moord*) by adding the element of premeditation, thereby also increasing the maximum punishment:

> 'He who intentionally and with premeditation takes the life of another person is, as guilty of murder, punished by life imprisonment or a term of imprisonment of not more than thirty years or a fine of the fifth category.'[78]

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[78] To be complete, next to these intentional forms of homicide, Article 307 DCC punishes negligent manslaughter (*dood door schuld*).

Premeditation can be generally defined as the defendant's weighing of contrasting motives and the decision to break the law, a psychological element of reflection implying a higher degree of control and legal hostility. This is then juxtaposed with spontaneous or impulsive killing.[79] Now, premeditation has to be distinguished from fault elements because premeditation precedes the intentional act of killing.[80] Moreover, the psychological element of refection is not only proven very objectively, it could even be said that, according to Dutch case law, the criterion of premeditation consists of the mere opportunity to reflect.[81]

To distinguish on the basis of premeditation used to be common in Germany too.[82] At present however, murder is defined as intentional killing coupled with an array of possible motives and *modi operandi*, not including premeditation. §211 GCC reads as follows:

> '(1) Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life.
> (2) A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.'

In comparison, the manslaughter (*Totschlag*) offence of §212 GCC holds a person who intentionally kills someone, but without being a murderer, liable to imprisonment of not less than five years. This illustrates how important it is to distinguish motives from intent. The concept of dolus is in itself value-neutral, has no moral connotations and does not therefore include evil motives.[83] Intentionally killing a person refers to exactly that and not to killing because of an additional evil motive.

In English law mens rea is also considered to be value-neutral. Although traditionally mens rea used to encompass not only thoughts in the mind but also the dark motives and roiling emotions that lay beneath, in time, emotions and motive have been cut from the core of the concept.[84] For example, because the term 'malice aforethought' – the fault element for murder – was held to have connotations of 'ill will' or 'wickedness', it was judicially disapproved.[85] Malice aforethought has come to mean either an intention to kill or an intention to cause grievous bodily harm. The defendant's motives need not be malicious, and are in fact irrelevant. For example, deliberate euthanasia prompted by motives of compassion fulfils the fault element for murder just as well as shooting someone because you want the victim's money. In German law, however, only the second scenario would be considered murder.

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[79] C.F. Stuckenberg, 'Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht' (De Gruyter Recht 2007), pp. 279–281.

[80] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 259.

[81] HR 27 June 2000, NJ 2000, 605; HR 11 June 2002, NbSr 2002; F.S. Bakker, 'Voorbedachte raad' Delikt en Delinkwent (2011), pp. 220–246.

[82] W. Joecks and K. Miebach, 'Münchener Kommentar zum StGB; Band 1' (C.H. Beck Verlag 2003), note 2 on §211 GCC.

[83] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 126; D. Ormerod, 'Smith & Hogan: Criminal Law' (Oxford University Press 2005), p. 23.

[84] N.J. Finkel and W.G. Parrot, 'Emotions and culpability: How the Law is at odds with Psychology, Jurors and Itself' (American Psychological Association 2006), p. 23.

The demarcation of fault elements from motive does not mean that motives are not relevant at all. Obviously, they are relevant in sentencing, but they may have an influence on criminal liability too. They may relate to wrongfulness and blameworthiness and may therefore become relevant for the application of justifications and excuses. For example, a person may have intentionally killed an aggressor with the purpose of self-defence, i.e. to defend life, limb and goods of oneself or another. This motive is quite different from revenge, and may even lead to a negation of criminal liability.[86]

4. STRICT LIABILITY

The rule that mens rea is an essential element of every crime is not without exceptions. Some offences do not require a fault element at all. These are generally known as strict liability offences. Most of these offences are of a regulatory nature and are created by specific statutes.[87] For example, in most legal systems you may be fined for speeding, regardless of whether you knew or should have known that you were driving too fast. The self-evident nature of such an offence begs the question why we require mens rea in the first place, and usually the maximum sentencing is relatively small.

In most instances, strict liability serves a pragmatic purpose. Offences like speeding are committed on a large scale. Not requiring proof of mens rea significantly strengthens the hand of enforcement. Drivers cannot claim that they did not know they were going too fast. The simple establishment of exceeding the speed limit suffices for punishment.[88]

Strict liability is very common in the English legal system. Most of the approximately 8,000 offences in England are strict liability offences with relatively low penalties and almost half of the more serious offences contain a strict element.[89] In the Netherlands, strict liability is also common in misdemeanours.[90] By contrast, in German criminal law, strict liability is generally rejected altogether, even if it concerns regulatory law.[91]

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[85] R v Cunningham [1957] 2 All ER 412.

[86] See: Chapter VIII, section 3.

[87] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 175.

[88] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 191; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 162–163.

Strict liability does not mean that persons will simply be punished for doing something illegal. Although no subjective connection of mens rea is required between the conduct and the perpetrator, the defendant can always raise a defence of due diligence. If this is accepted, the defendant is acquitted. For instance, if the defendant exceeded the speed limit, but his speedometer told him otherwise, this mistake may be excused, provided he did not drive so excessively fast that he could have known his speedometer was incorrect. In order to successfully rely on the defence, the defendant must demonstrate he did everything he could reasonably do to avoid the mistake. Again, more will be required from a professional mechanic. Any other person should in principle be able to rely on the periodical technical inspection of his vehicle. In those circumstances, the judge would need to acquit the defendant.

A defence of due diligence against strict liability offences is particularly relevant for professional actors. Strict liability is very common in a professional, economic, legal context. Actors are required to abide by strict duties of care. English statutes often explicitly provide for such a defence, such as in section 8 of the Health Act 2006:

> '"Offence of failing to prevent smoking in smoke-free place"
> (1) It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking. [...]
> (4) A person who fails to comply with the duty in subsection (1), or any corresponding duty in regulations under subsection (3), commits an offence.
> (5) It is a defence for a person charged with an offence under subsection (4) to show –
> (a) that he took reasonable steps to cause the person in question to stop smoking, or
> (b) that he did not know, and could not reasonably have been expected to know, that the person in question was smoking, or
> (c) that on other grounds it was reasonable for him not to comply with the duty.'

A defendant would be able to rely on the grounds listed in subsection (5) to escape conviction for failing to prevent smoking in a smoke-free place. The most common forms of due diligence are listed under (a) and (b), while (c) leaves room for any other form of due diligence defence. Most continental legal systems would not specify the possible exceptions to the norm in law, leaving the concretisation of what is acceptable under a due diligence defence to the Court, possibly guided by some examples in the explanatory documents of the legislation. It can be expected however that similar exceptions to such a broad criminalisation would be accepted in all legal systems.

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[89] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 20, 155 and 164.

[90] T. Blom, 'Opiumwetgeving en drugsbeleid' (Kluwer 2008), p. 122.

[91] M. Hörster, 'Die strict liability des englishen Strafrechts – Zugleich eine Gegenübertstellung mit dem deutschen Straf- und Ordnungswidrigkeitenrecht' (Duncker & Humboldt 2009), pp. 29–44.

When a due diligence defence is accepted, the defendants are not acquitted because a fault element was lacking. After all, the strict offence requires no fault at all. They are acquitted because the defendant was blameless. As already mentioned in Chapter IV, like fault, blameworthiness also requires a subjective connection between act and perpetrator. However, this connection is of a much more diluted nature than that of intention and negligence. It is an 'implied' element of every crime – situated in the third tier in the tripartite structure of an offence – and negated by an excuse, like duress or due diligence. These defences follow from the principle of guilt, in Latin *nulla poena sine culpa*. This means there may be no punishment without blameworthiness. According to the ECtHR, strict liability is therefore only acceptable as long as it remains possible for the defendant to escape punishment by making probable that he cannot be blamed for committing the offence.[92] By contrast, German law interprets the principle of guilt much more broadly as 'no punishment without negligence' and even attaches constitutional status to it. With some exceptions,[93] German law thus always requires negligence and rejects strict liability.

5. CONCLUDING REMARKS

This chapter set out to discuss the subjective or fault elements of a crime. All legal systems distinguish different forms of mens rea, reflecting degrees of culpability. For example, homicide can be committed intentionally or by negligence. Such a difference in terms of fault is also often expressed in the range of punishment that can be imposed. It has been attempted to show that the most serious and the least serious fault elements – dolus (in)directus and inadvertent negligence – are quite similar in all three legal systems. From both a comparative and conceptual perspective, the most interesting form of mens rea is the fault element that deals with situations of dangerous risk-taking, situated in between these two extremes. An adequate legal protection of interests demands an additional form of mens rea that encompasses less culpability than intention but more than negligence.

In the English legal system, the separate fault element of recklessness fulfils this important role. The functional equivalent in civil law systems, like Germany and the Netherlands, is not a separate kind of fault, but a broadening of intent, called dolus eventualis, that includes the conscious acceptance of side-effects. Whereas dolus directus and indirectus consist of a great degree of volition or knowledge, which allows them to be viewed as equally culpable, dolus eventualis consists, as it were, only of residues of both aspects. Hence dolus eventualis is the lowest form of intent, resembling in terms of rationale and function the English law concept of recklessness.

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[92] Salabiaku v France, Appl. No. 10519/83, 7 October 1998.

[93] See for example: §§186, 323a and 231 GCC.

Dolus eventualis is quite similar in Germany and the Netherlands. The cognitive component of conditional intent refers to the awareness of a risk; the volitional component is about the attitude of the actor, whether he accepted and took the risk into the bargain. However, there is still this important difference: since German law does not require that the risk must be considerable, the limiting function of the volitional element is more important than in the Netherlands. In German law it is therefore often assumed that the defendant did not accept the realisation of a risk that was merely possible, whereas under Dutch law a small chance has already been excluded from conditional intent under the cognitive limb.

It should also be noted that in civil law systems the difference between dolus eventualis and negligence is based on the volitional element. If the actor was aware of the risk but did not reconcile himself to that risk, there can (only) be conscious negligence. In contrast, in the English common law system, the difference between recklessness and negligence is based on awareness. The negligent actor is unaware of the risk. He cannot be acquitted of recklessness by arguing that he trusted in a good outcome. The awareness of the risk is decisive, not whether he accepted it or not. Recklessness therefore subsumes cases that in Dutch and German criminal law are covered by dolus eventualis and conscious negligence.

The only exception to the rule that no criminal liability is allowed without proof of a fault element are so-called strict liability offences. It is interesting to note that while strict liability is quite popular in the Netherlands and England, and the principle of guilt as interpreted by the ECtHR does not militate against it, German criminal law strongly objects to this form of liability.

CHAPTER VIII
JUSTIFICATIONS AND EXCUSES

Jeroen BLOMSMA and David ROEF

1. INTRODUCTION

Even if it is clear that a person's conduct fits the legal definition of an offence, the question may come up as to whether he is liable to be convicted for that offence. Criminal law provides certain circumstances (defences) that take away the criminal liability of the perpetrator. In general we distinguish between justifications and excuses. Since the 20th century this categorisation of defences has been very common in Western criminal law. It is widely accepted in all civil law systems, and even if not generally accepted in England, it is at least well known. Whereas two decades ago, English law still appeared to lack interest in the distinction for want of practical relevance, it has received more attention since then.

The dichotomy plays an important conceptual and normative role in theory and practice. It makes a fundamental distinction between wrongfulness and blameworthiness, between act and actor, between an objective evaluation of all things considered and subjective reasons for acting. The dichotomy therefore coincides with the second and third tier on the ladder of criminal liability.[1] This explains a large part of why the distinction is of lesser influence in the bipartite system of English law, where fault elements and blameworthiness are often not clearly separated. In addition, English courts are less concerned with dogmatic reasoning than they are with finding an acceptable outcome.

Criminal law recognises a wide range of justifications and excuses that can be put forward by the defendant. This chapter is limited to a discussion of the justifications of self-defence and necessity, the corresponding excuses of self-defence-excess and duress, and the excuse of insanity. We will also give some attention to the possible effect of intoxication on criminal liability. But before we explore these different defences in a comparative way, the rationale of the dichotomy as such must be discussed in more detail.

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[1] See: Chapter IV.

2. RATIONALE OF THE DICHOTOMY

2.1. COMMUNICATIVE DIFFERENCE

The most fundamental rationale of the distinction is that a justification negates the wrongfulness of the act, while an excuse negates the blameworthiness of the actor.[2] This brings about a communicative difference. A conviction communicates the reproach towards the perpetrator, makes clear that he should be condemned for doing what he did. Preventive purposes are served by making clear that this conduct is criminal, signalling that it will be punished. Arguably a distinction can be made between acquitting a defendant who did not commit the crime at all, and acquitting a defendant who committed the crime but was justified in doing so, for example in self-defence. The dichotomy of justification and excuse enables an even more nuanced communication. There is a moral difference between having acted, all things considered, in accordance with the legal order and merely being excused because you cannot be blamed for having infringed the norms of the legal order.[3]

In legal terms, wrongfulness constitutes the law's socio-ethical condemnation of the act, whereas blameworthiness constitutes a social-ethical reprimand against the actor.[4] The acceptance of an excuse makes clear to the defendant and the public that what he did was wrong, whereas the acceptance of a justification denies that what the defendant did was wrongful in the eyes of the legal order. Already in 1797, we see how the German philosopher Kant used the example of two shipwrecked persons fighting for a plank that is only large enough to support one of them to illustrate the difference between justifications and excuses. He argued that the necessity of the situation does not make what is unjust lawful. However, no law can demand a person to sacrifice himself. The certain threat of death will always weigh heavier than the possible death penalty for homicide. Thus, the act of violent self-preservation is not justified – '*unsträflich*' – but merely excused – '*unstrafbar*'.[5] As we will see later, this form of necessity is generally called duress, to emphasise the excusatory nature of the defence.

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[2] V. Krey, 'German Criminal Law – General Part – Volume II – Legal Elements of the Intentional Offence Committed by Action' (Verlag W. Kohlhammer 2003), pp. 12–13; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 578; A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 673; D.H. de Jong and G. Knigge, 'Het materiële strafrecht' (Gouda Quint 2003), p. 55.

[3] A. Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime' in A. Eser and G.P. Fletcher (eds.), Rechtfertigung und Entschuldigung – Rechtsvergleichende Perspektiven (Eigenverlag Max-Planck-Institut 1987), pp. 26–27; V. Tadross, 'The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder' Criminal Law Review (2005), pp. 120 and 266.

[4] V. Krey, 'German Criminal Law – General Part – Volume II – Legal Elements of the Intentional Offence Committed by Action' (Verlag W. Kohlhammer 2003), pp. 12–13.

The communicative advantage of the dichotomy becomes more clear when we reintroduce *R v Dudley and Stephens* (already discussed in Chapter IV), the case of the crew of the Mignonette, who ate the cabin boy when they were cast away. The excuse of duress was rejected because the court feared the public would misunderstand their acquittal as a justification of their actions. Thus we see how the lack of a clear conceptual distinction between justificatory and excusatory circumstances may lead to an unwillingness to excuse the defendant, fearing that this message will be misinterpreted. By contrast, in systems that acknowledge the difference between wrongfulness and blameworthiness, such cases can be dealt with more appropriately due to the justification/excuse dichotomy. While killing another (innocent) human being for the sake of one's own survival certainly fulfils the offence definition of murder and is considered wrongful, no one can be blamed on a personal level for giving in to one of the strongest human instincts, i.e. self-preservation.

2.2. PERSONAL AND UNIVERSAL APPLICATION

Perhaps the most important practical implication of the dichotomy is that justifications are believed to have a universal character, whereas excuses operate only personally. This means that if someone is justified, a third party may assist that person, whereas if that someone is merely excused, a third party may not intervene. For example, if the defendant helped someone who was using force in self-defence, he will not be liable for aiding. In contrast, if that someone was coerced to injure another, the defendant will be liable for helping that excused actor. Arguably, the aider was not personally coerced to injure the victim.[6]

The universal application of justifications is often based on the perspective that justified conduct is said to produce a net social benefit and therefore constitutes no wrong. It should therefore be supported by the legal order, by making clear that others are allowed to help the justified actor. This is reflected in the national doctrines on participation. Participation is only possible in a wrongful act, so a justification applies to all participants.

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[5] J. Hruschka, 'On the History of Justification and Excuse in Cases of Necessity', in B.S. Byrd and J. Hruschka (eds.), Kant and Law (Ashgate 2007), pp. 323–335.

[6] D. Ormerod, 'Smith & Hogan: Criminal Law' (Oxford University Press 2005), p. 268; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 964.

3. SELF-DEFENCE

Self-defence is arguably the most popular and self-evident defence of all.[7] Before we explore the conditions of self-defence in an integrated manner, while highlighting some national differences, it is good to mention some rationales that may ground self-defence.

3.1. RATIONALES

First and foremost, defending oneself can be seen as a natural right. This rationale was dominant until the 19th century, after which the rationale of the legal order grew in importance.[8] Historically, it is grounded in the right of self-preservation of man.[9] It is argued that before the formation of societies, personal survival was essential. A natural right existed to defend oneself against attacks from others. In the narrative of the social contract between the individual and the state, the individual transferred some of his freedom to the state, in return for protection.[10] Nonetheless, it has also always been clear that the state cannot always intervene in time. A legal system cannot uphold the right to life, protected under Article 2 ECHR, without a right to self-defence. The contract between state and citizens therefore does not exclude their natural right of self-preservation.

In Anglo-American law a classic and very common rationale concentrates on the culpability of the aggressor. This rationale focuses on the aggressor's rights in two possible ways, the first of which is the approach of forfeiture. The aggressor, by his conduct, loses his right to life or at least the right to claim this right. This approach has been criticised and a more appropriate variation – that of reduction – has been put forward. In this approach, the aggressor does not lose his rights, but because the aggressor is responsible for the danger, the value of his rights is reduced when balancing the competing interests at stake.[11] The rationale thus explains why in the situation where the life of the aggressor is juxtaposed with the life of the attacked person, the latter is objectively justified in favouring his own.

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[7] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 137–138.

[8] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 133–134.

[9] See: W. Blackstone, 'Commentaries on the Laws of England – A Facsimile of the First Edition of 1765–1796 – Volume IV of Public Wrongs (1769)' (University of Chicago Press 1979), p. 186.

[10] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 30–31.

[11] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 858; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 44–45.

As will be explained, self-defence is only allowed when necessary and proportional. These conditions are strongly related to the rationale of protection of the legal order which arguably includes also the life of the aggressor. Although the right to life is not absolute, it does greatly restrict the use of deadly force by requiring a high threshold of necessity and proportionality.[12] A single focus on the interests of the attacked person would not require proportionality. It would suffice that the defensive force, of whatever degree and for whatever danger, is necessary for the protection of the autonomy of the attacked person.[13] In other words, this limitation to the right of self-defence can only be based on a rationale that concentrates on other interests as well, such as those of the legal order as a whole.[14] Excessive injury to the aggressor may harm the legal order. Only this perspective can explain the upper limit of proportionality in both self-defence and self-defence-excess.

3.2. CRITERIA

The criteria for self-defence can already for a large part be deduced from some legal definitions. §32 GCC defines self-defence as follows:

> '(1) A person who commits an act in self-defence does not act unlawfully.
> (2) Self-defence means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.'

And Article 41(1) DCC:

> 'He who commits an act where this is necessary in the defence of his person or the person of another, his or another's person's integrity or property, against an imminent unlawful attack, is not criminally liable.'

In order for self-defence to justify a criminal offence, the attack must be wrongful, imminent, and infringe an individual interest. Next, self-defence must be necessary, i.e. the defendant is only allowed to use the least intrusive means of defence. This is also called the subsidiarity requirement. Moreover, the defendant must act in line with the requirements of proportionality. While necessity speaks to the question of whether some less costly means of defence, such as merely firing a warning shot, might be sufficient, the requirement of proportionality is more focused on the gravity of the attack, addressing the ratio of interest threatened on the side both of the aggressor and of the defender.[15]

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[12] A. Ashworth, 'Self-defence and the right to life' The Cambridge Law Journal (1975), p. 283; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 42–43.

[13] G.P. Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' Israel Law Review (1973), p. 381.

[14] C. Roxin, 'Die "socialethishen Einschränkungen" des Notwehrrechts – Versuch einer Bilanz' Zeitschrift für die gesamte Strafrechtswissenschaft (1981), pp. 74–77; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 675–676.

3.2.1. *Interrelationship of the criteria*

It should be noted that the above categorisation of criteria is by no means self-evident. Amongst other things, the choice of defensive means is often closely connected with the subsequent question of proportionality of how one should use these least intrusive means. For example, if a firearm may be chosen, the defendant can subsequently choose to fire a bullet at the leg or torso of the aggressor. As a result of this close connection, proportionality is often understood to encompass not only the intensity of the defence but also the choice of defensive means (subsidiarity). In Germany, for example, the least intrusive means is sometimes discussed in close relation with the intensity of the defence, the latter therefore dubbed proportionality stricto sensu.[16]

As to English law, distinguishing the criteria for self-defence seems even more complicated. English case law on self-defence has now been codified in section 76 of the Criminal Justice and Immigration Act 2008. This codification includes (i) the common law private self-defence and (ii) the public defence of section 3 of the Criminal Law Act 1967, which provides that a person may use force in the prevention of crime or in arresting offenders or suspects. Both defences require that the force applied should be reasonable, and the force is reasonable if it is necessary and proportional. Thus the English law sweeps within one inquiry what should preferably be distinguished.[17]

Notwithstanding these differences, in this chapter we will distinguish, mainly for reasons of didactic clarity, the requirement of necessity from that of proportionality by limiting the former to the use of least intrusive means and the latter to the intensity of the defence. Of course, this does not deny the fact that necessity and proportionality mutually influence each other.

3.2.2. *Wrongful and imminent attack*

Only a wrongful attack can give rise to self-defence. An attack can be defined as an immediate threat to legally protected interests through human behaviour.[18]

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[15] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 135.

[16] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 674–683.

[17] G.P. Fletcher, 'The Right and the Reasonable' in A. Eser and G.P. Fletcher (eds.), Rechtfertigung und Entschuldigung – Rechtsvergleichende Perspektiven (Eigenverlag Max-Planck-Institut 1987), p. 89. We will therefore discuss this English reasonableness standard in a separate section (3.2.6).

[18] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag (2006), p. 657; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 100.

Thus, attacks of an animal only qualify under self-defence if a human has incited it. In that case, the animal can be equated with any other tool the aggressor could have used to attack. In other cases, defensive force against animals can only be justified under necessity.[19]

The requirement that the attack must be wrongful or unlawful shows that self-defence is a fight of right against wrong. It therefore also serves to exclude from the defence situations wherein public officials carry out their official tasks of, for example, arrest.[20]

Self-defence only applies against attacks that are imminent, have begun or are ongoing.[21] In those cases, the attacked person cannot wait for the official authorities to protect his interest. In order to avert the attack, to minimise the harm, he must act himself (leaving aside for now other alternatives such as retreating).[22] The difficulty lies in determining the limits of this temporal requirement: when does the attack start and when does it end? It is located in between two facets. On the one hand, self-defence may be performed at its earliest when danger is already close. It may be performed on the other hand only as long as the attack continues, otherwise it would be retaliation.

To start with the latter facet, the right to self-defence ends with the end of the attack. The attack is ongoing until the aggression has been factually completed either by abandoning the attempt, by its failure or by causing the definite violation of the protected interest, so there is no further harm to be avoided. However, the completion of the legal elements of an offence is not constitutive, as the person whose bag is stolen may pursue the thief and use force to regain possession in self-defence. The attack will be ongoing until the thief has secured full and safe possession of the bag.[23]

Regarding the starting point, defensive force would become useless if the criteria to determine the beginning of the attack were too strict.[24] When the attack has already started, some harm may have already been inflicted and the defendant may no longer be able to stop the attack. In the absence of other options, the defendant must have the opportunity to avert any harm to a protected legal interest. The criterion is therefore that the attack or danger thereof should be imminent, not that the interest is actually infringed.[25] In contrast, the mere fear of an attack cannot warrant self-defence.[26]

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[19] 26 February 1960 BGHSt 14, 152; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 657–658.

[20] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 613–614.

[21] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 644; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 321–322.

[22] R.P. Kaufmann, 'Self-Defense, Imminence, and the Battered Woman' New Criminal Law Review (2007), pp. 354–359.

[23] 12 February 2003 BGHSt 48, 207; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 101; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 257–260.

[24] 7 November 1972 BHGS NJW 1973, 255; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 321–322.

3.2.3. Legitimate interests

The interests that may be defended in self-defence are limited. Due to this limitation, self-defence is demarcated from a general right to fight wrong.[27] The wrongful attack needs to be aimed at a legitimate interest of the attacked person. It is undisputed that interests like a person's life, liberty, body and property qualify as legitimate interests.[28]

A quick look at §32 GCC makes clear that the scope of legitimate interests is the widest in Germany, where the starting point is that any individual legal interest can be defended.[29] In contrast, Dutch law exclusively lists the interests that can be defended. In practice this does not necessarily lead to different outcomes. For example, in contrast to Germany,[30] trespass cannot give rise to self-defence in the Netherlands.[31] However, it is assumed that this will usually bring about an immediate danger to life, body and/or property and thus qualify for self-defence.[32] When the attacked person is inside his own house, he can in principle not be required to retreat.

Finally, it should be noted that the above-mentioned legal interests of a third party may also be defended. Hence, the German term '*Notwehr*', or the Dutch equivalent '*noodweer*', is perhaps a more suitable label for this justification than *self*-defence.[33] The case for defence of another is justified by the rationale of the protection of the legal order.

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[25] HR 2 February 1965, NJ 1965, 262 and HR 30 March 1976, NJ 1976, 322; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 321.

[26] HR 8 February 1932, NJ 1932, p. 617; HR 18 September 1989, NJ 1990, 291; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 321.

[27] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 640.

[28] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 669–670; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), p. 123.

[29] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 136.

[30] 15 May 1979 BHGSt 3, 217; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 669.

[31] HR 14 April 1998, NJ 1998, 662.

[32] HR 27 May 2008, NJ 2008, 510; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 319.

[33] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 1–2.

3.2.4. *Necessity*

The necessity or subsidiarity requirement deals primarily with the question of whether the defendant has used the least intrusive means of defence to ward off the attack. For example, the defendant should use his fists rather than a weapon if that will suffice to repel the attack.[34] However, in German law, it is required first and foremost that the means must be capable of either ending or at least hindering the attack. This element of adequacy is easily met. Only what is clearly not adequate to end the danger is excluded from self-defence, like the destruction of goods that have no relation to the attack. The defendant does not have to be certain that his actions will in fact be able to avert the attack. What suffices is the possibility that by this action the attack is diminished in intensity or postponed. Thus, the defendant is allowed to defend himself with force against a superior opponent or great number of opponents, even if he accepts the possibility he might get the worst of it.[35]

As the use of force in self-defence seems to only be necessary when there are no alternatives, an important question is whether one is to avoid or end the confrontation by retreating. The focus on state monopoly of violence seems to imply that one has a strict duty to retreat or avoid conflict. As a result, the Dutch Supreme Court for a long time applied the rule that self-defence is not necessary when there is a possibility to retreat.[36] In contrast, a strict duty to retreat has never been part of the German law on self-defence, since right should never give way to wrong. German courts have even legitimised a lenient approach by arguing that the law does not require a 'humiliating retreat'.[37] The German Supreme Court even held in the case where a schoolboy, who had been bullied numerous times before, brought a knife to school and stabbed his bullies, that this defendant was not required to get the help of teachers since this would be a shameful retreat.[38] Arguably such a wide scope of self-defence fails to respect the interests of the aggressor and, in combination with a pre-emptive strike, runs the risk of over-stimulating self-assertion.[39]

Currently, an absolute duty to retreat no longer exists in any of the legal systems. It is therefore more appropriate to talk about a possibility to retreat. English and Dutch law have definitely moved towards German law, by considering the possibility to retreat as only one of the factors that may determine the justification, such as the blameworthiness of the aggressor or the defendant himself (prior fault). For example, a real duty to retreat may still exist when the aggressor is an infant or the defendant provoked the aggressor.[40]

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[34] 11 September 1995 BGH NStZ 1996, 29.

[35] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 651–652; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 10.

[36] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 324.

[37] 26 May 1964 BGH GA 1965, 147. See also: T. Fisher (ed.), 'Strafgesetzbuch und Nebengesetze' (C.H. Beck 2009), p. 295.

[38] 24 July 1979 BHG NJW 1980, 2263. In contrast see the Dutch case in Hof Amsterdam 22 July 2008, ECLI:NL:GHAMS:2008:BD8276, where even self-defence-excess was rejected.

[39] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 125; F. Leverick, 'Killing in Self-Defence' (Oxford University Press 2006), p. 82.

In principle, the mere possibility of retreat does not necessarily preclude the justification. As a consequence, the scope of self-defence has become broader than it originally was. For example, getting (official) help is only required when this help is immediately available without extraordinary efforts.[41] In addition, the attacked person cannot be required to retreat when the path of retreat endangers the attacked person, when retreat would merely gain time or when it is hardly possible.[42] A person attacked at home also has no duty to withdraw.[43]

The modern rationale for this rule is that retreat harms the legal order as it 'constitutes a retreat of law and order before the aggressor who violates the law.'[44] A strict duty to retreat would mean that right gives way to wrong. If it were different, this would encourage aggressive and threatening behaviour. An example of this is a case where the defendant could not use his right of way because a trailer blocked the driveway. He would have moved it himself, had he not been in an argument with its owner for some time. Knowing there was a risk the owner would react violently, he went into the owner's greenhouse to ask him to move his trailer, only to be told to get out of there. The defendant however stayed where he was and was attacked, whereupon he defended himself by stabbing the victim with a pair of scissors.[45]

3.2.5. *Proportionality*

The proportionality standard assesses the relationship between the offence committed and the amount of harm likely to be suffered by the defendant.[46] Simply put, it is about weighing the interests of the aggressor against those of the defendant.

It should be stressed that it is not required that force must be exactly in proportion with the attack. As long as the defensive force was not a

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[40] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 104.

[41] 5 October 1965 BGH VRS 30, 281; 11 January 1984 BGH NJW 1984, 986; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 680.

[42] HR 15 January 2008, RvdW 2008, 120; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 197 and 202–203.

[43] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 124; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 324.

[44] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), p. 194.

[45] HR 29 April 1997, NJ 1997, 627. See also: HR 28 March 2006, NJ 2006, 509.

[46] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 120.

disproportionate response to the attack, the defendant will be justified. It is also not required that the anticipated evil should have been greater than the force used to avert this. For instance, lethal force can be justified even when the danger to the attacked person was of severe bodily harm or less, as in rape.[47] This can be grounded in the reproach that can be made against the aggressor and because the defendant cannot be required to make a perfect weighing of interests in an urgent situation. Similar considerations apply regarding the possibility to first threaten with a weapon before actually using it. Threatening is only required if the circumstances allow for it.[48] For example, the defendant does not have to threaten first if he runs the risk of thus being injured.[49]

What is considered disproportionate is assessed by reference to the strength of the attack, the dangerousness of the aggressor and the available means, taking into account all the circumstances of the situation.[50] Because of the enormous weight of the circumstances of the case, the approach to proportionality, like that of necessity, is very factual and casuistic. Both aspects are established ex ante objectively by reference to a reasonable man standard at the time of the attack, being aware of all objectively knowable circumstances as they were at the time, rather than as they turned out to be ex post.[51]

However, despite the objective standard, individual characteristics can lower and raise the proportionality requirement. For example, disparity of strength, size and relationship between defender and aggressor can explain why the use of weapons against an unarmed aggressor can sometimes be proportionate. On the contrary, a trained boxer can be expected to use his fists.[52] '*Garantenstellung*' also indicates that a defendant has a certain function to which norms apply, and therefore more can be expected from him. A police officer is, for example, deemed to be better at assessing situations and responding appropriately.[53]

It is interesting to note that in recent years, the Dutch Supreme Court has extended the scope of proportionality. Because of this and changing perceptions, Dutch courts have become more lenient in allowing self-defence. For example, a jeweller who saw he was being robbed, took a gun, descended the stairs and started shooting, could rely on the defence.[54] So could the defendant who pursued a burglar with a baseball bat, caught up with him and, in overpowering him, inflicted serious injuries on him.[55]

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[47] 11 September 1995 BGH NStZ 1996, 29; B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 168, 183 and 196–197.

[48] 9 August 2005 BGH NStZ 2006, 152; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 676.

[49] 25 November 1980 BGH NStZ 1981, 138.

[50] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 651–652.

[51] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag (2006), p. 678.

[52] 25 November 1980 BGH NStZ 1981, 138; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 659, 676 and 678.

[53] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 128.

[54] Rb. Breda 8 May 2003, ECLI:NL:RBBRE:2003:AF8365.

The opposite trend exists in Germany, as a result of which the national concepts of self-defence have moved towards each other. Here it is important to note that for a long time even proportionality was foreign to the German concept of self-defence. However, it can now be concluded that this is currently also an important limitation to self-defence.[56] A classic example that is most often used to illustrate the traditional lack of a proportionality requirement is that of the farmer who caught schoolboys stealing his apples. He would be acquitted based on self-defence for shooting at them, because this was the only way of stopping them. Clearly, this gave rise to quite some controversy, as the property rights to apples seem to be favoured over the lives of the young boys.[57] Such an outcome would be unacceptable under Dutch law as the legislator explicitly included a proportionality requirement.[58] By contrast, German law traditionally puts great weight on the dogma that right should never yield to wrong, focusing on necessity. Theft constitutes an ongoing attack, and if there were no other means of ending the attack, even lethal force was allowed to secure property.[59] Any other solution would imply that the farmer has to accept the loss, and thus yield to wrong. Nonetheless, over the years it was increasingly recognised that the lack of a proportionality standard could lead to absurd outcomes that could hardly be said to serve the legal order.[60] The legal order is after all concerned with the interests of the aggressor too. Thus in current German law, consequences that are blatantly disproportional to the threatened harm can be disallowed as disproportionate under the doctrine of abuse of rights, even when it is the only option available.[61]

3.2.6. *The 'reasonableness' requirement in England*

As already mentioned, in English law self-defence can only succeed if the defendant used 'reasonable force' against the attack. This rather broad criterion covers aspects of necessity and proportionality. First, section 76(3) of the Criminal Justice and Immigration Act 2008 provides a purely subjective approach in determining whether an act of self-defence is necessary:

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[55] Rb. Almelo 19 October 2007,ECLI:NL:RBALM:2007:BB6018.

[56] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 74, 127 and 170.

[57] In 20 September 1920 RGSt 55, 82, a farmer had shot at thieves who were fleeing with his fruit. He was justified because they did not respond to his warnings. The German Supreme Court saw no problem of proportionality.

[58] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 308.

[59] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), pp. 639 and 651.

[60] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 684.

[61] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 65 and 170–172. To be precise, these 'socio-ethical limitations' of the use of self-defence are therefore theoretically not so much grounded in the test of proportionality stricto sensu ('*Verhaltnismäβigkeit*') but in the concept of '*Gebotenheit*', which also translates as proportionality.

> 'The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D *believed* them to be'.

The necessity of applying defensive force should thus be assessed on the basis of the danger the defendant took to be present. This means that any genuine mistake on the facts giving rise to self-defence will therefore acquit. The established common law position regarding this so-called imaginary or putative self-defence[62] is explicitly laid down in section 76(4):

> 'If D claims to have held a particular belief as regards the existence of any circumstances –
> (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
> (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not –
>   (i) it was mistaken, or
>   (ii) (if it was mistaken) the mistake was a reasonable one to have made.'

In short, if a defendant makes an honest mistake which leads him to believe there are circumstances making self-defence necessary, the courts will assess the necessity of the defendant's conduct on the basis of the facts as the defendant believed them to be, even if the mistake was not a reasonable one to make.[63] The main rationale for not requiring a *reasonable* mistake is that since the mistake would have justified his conduct, if it were correct, the defendant aimed to act in conformity with the legal order. A requirement of reasonableness would also deter people from helping others.[64] One may ask whether this reasoning is logically and morally sound. One could also argue that the commission of a prima facie wrong, i.e. the use of deadly force, means that the defendant should be especially diligent in assessing whether the circumstances giving rise to a defence are actually present. In other words, if any mistake allows for the use of force, are then the rights of an innocent person, who is unreasonably mistaken for an aggressor, still respected?[65] Requiring a reasonable mistake seems necessary in order to strike a fair balance between the interests of offender and defender.

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[62] Although putative self-defence is rather an excuse than a justification, because the circumstances for justification were absent and the defendant merely believed they were present, it should be noted that in English law it is still considered to be a justified self-defence. See for criticism on this position: A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 215–218. By contrast, in the Netherlands a putative self-defence is more viewed as an excuse, while in German law it is considered to deny the intent of the defendant. See: J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 332–333.

[63] The origin of this position was R v Williams (Gladstone) [1987] 3 All ER 411, where the Court of Appeal concluded that a defendant charged with assault could successfully plead self-defence on the basis of an honest but unreasonable belief that the victim was being attacked.

[64] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), pp. 288–289.

This subjective approach means, for example, that the police can avoid criminal liability where they have shot members of the public mistakenly, even when they unreasonably believed that they were armed and dangerous. We may refer here, for example, to the case of Jean Charles de Menezes who was fatally shot in the London Underground in 2005 when the police mistook him for a suicide bomber.[66] The Crown Prosecution Service decided not to prosecute any of the police officers. Although they were mistaken as to the facts, the court would not convict them as it would take into account the facts as the police believed them to be. This raises the question whether English law is still compatible with Article 2 ECHR, the right to life. According to the ECtHR any use of deadly force must be both 'absolutely necessary' and 'strictly proportionate', and if based on a mistaken belief, it must be held for good reasons.[67] The UK has been brought before the ECtHR by relatives of persons shot in putative self-defence numerous times. Nonetheless, the UK has not often been held to have violated Article 2 ECHR.[68]

Secondly, as well as a subjective necessity requirement, the English reasonableness standard also requires that the force used is proportionate to the value being upheld. Section 76(6) of the Criminal Justice and Immigration Act 2008 provides:

> 'The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.'

What constitutes reasonable force is for the jury to decide, weighing the amount of force used against the harm the defendant sought to prevent. What is important, however, is that a mistake about the intensity or scope of the self-defence must be reasonable to acquit.[69] The belief principle does not apply here. Normative standards such as proportionality should not be the object of subjective assessment.[70] Thus while an unreasonable mistake in relation to the existence of an attack can lead to an acquittal on the basis of self-defence, this is not possible if the defendant honestly but mistakenly believes that a certain (excessive) degree of force is necessary to repeal that attack.[71]

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[65] F. Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' Criminal Law Review (2002), p. 349.

[66] C. Eliot and F. Quinn, 'Criminal Law' (Pearson Education Limited 2010), p. 351.

[67] McCann and others v the United Kingdom, Appl. No. 18984/91, 27 September 1995. See: F. Leverick, 'Killing in Self-Defence' (Oxford University Press 2006), pp. 185–187.

[68] F. Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' Criminal Law Review (2002), pp. 351–357.

[69] R v Owino [1996] 2 Cr App R 128; DPP v Armstrong-Braun [1998] 163 JP 271; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 431–432.

To conclude, it should be noted that in England there is a tendency to incorporate more acts of excessive force into the justification of self-defence than in civil law systems. This may for a large part also be explained by the fact that English law does not know the excuse of self-defence excess. In the absence of other legal solutions that allow for an acquittal, courts therefore seem more lenient in applying the test of proportionality.[72] Section 76(7) of the Criminal Justice and Immigration Act 2008 enables this by stating:

> '(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
> (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.'

After all, the exclusion of the excuse of self-defence-excess can lead to harsh results, especially if we consider that the defendant was attacked and that intentional killing will result in a mandatory 'life sentence' for murder, which always brings a minimum of 15 years of imprisonment.[73] This harshness is also mitigated by not prosecuting in those cases where the degree of force was not very far beyond the threshold of what is reasonable.[74]

4. SELF-DEFENCE-EXCESS

Self-defence is only justified if the necessary force was proportionate to the interest being upheld. However, if the defendant, overpowered by emotions like fear or rage, exceeds the limits of proportionality, civil law systems accept the possibility to invoke the excuse of self-defence-excess. Thus §33 GCC provides:

> 'If the perpetrator exceeds the limits of necessary defence due to confusion, fear or fright, then he shall not be punished.'

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[70] G.R. Sullivan, 'Knowledge, Belief and Culpability', in S. Shute and A.P. Simester (eds.), Criminal Law Theory: Doctrines of the General Part (Oxford University Press 2002), pp. 223–224.

[71] F. Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' Criminal Law Review (2002), p. 349.

[72] J. Horder, 'Excusing Crime' (Oxford University Press 2006), pp. 56–57.

[73] B. Sangero, 'Self-defence in Criminal Law' (Hart Publishing 2006), p. 297.

[74] CPS: 'Self-defence and the prevention of crime', www.cps.gov.uk/legal/section5/chapter-d.html.

And Article 41(2) DCC:

> 'Exceeding the limits of necessary defence, where such excess has been the direct result of a strong emotion brought about by the attack is not punishable.'

Although the excuse of self-defence-excess is not recognised in English law, there exist some functional equivalents that can reduce a charge of murder to a less serious one of manslaughter. These partial defences have similar rationales as excessive self-defence and will therefore also be briefly discussed.

4.1. INTENSIVE AND EXTENSIVE EXCESS

Two forms of the excess can be distinguished. In *intensive* excess, the degree of necessary force is exceeded. For example, the attacked person shoots the aggressor three times in his torso, when the attack could have also been averted with one shot at his legs.[75] The other form really deals not with proportionality as such, but more with the necessity of the defence, which usually ends after the attack. In *extensive* excess, the defendant either continues after the attack has ended or only reacts after the attack has ceased.[76] Consider the defendant who continued or even only started to kick the aggressor when he was no longer a threat, lying injured on the ground.

Arguably, extensive excess is problematic in light of the necessity requirement. If the attack has ended, the defence is no longer necessary. This makes it more controversial and therefore explains why it is not even recognised in Germany. However, in Dutch law this problem is overcome by requiring that a situation of self-defence must have existed at one point in time. For extensive excess to apply, there should be or have been a situation of self-defence. Accordingly, the Dutch Supreme Court quashes judgments that imply that there can be no excess simply because the situation of self-defence has already ended.[77]

In Germany however, the judiciary constantly precludes the excuse in these situations, arguing that only an actual situation of self-defence can be exceeded. For excessive self-defence to apply, the attack must still be wrongful; a situation of necessity must exist.[78] However, the recognition of extensive excess in Germany is not that far away, if we consider that courts apply a broad scope of imminence that includes situations of extensive excess as part of intensive excess. They accept that the imminence of an attack continues until its definitive termination. For example, when a repetition of the attack might be feared, the attack is still imminent and the force is judged as intensive excess.[79]

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[75] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 327.

[76] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 327.

[77] Like in HR 4 March 2008, NJ 2008, 158.

[78] 23 January BGH NStZ 2003, 599; 13 November 2008 BGH NStZ-RR 2009; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 998–999.

As mentioned, proportionality determines where self-defence ends and excess begins. If there is a self-defence situation, but the force used is disproportionate the defendant may still be excused. The criterion is, as always, assessed normatively. Depending on the circumstances, the court can therefore also hold that the force was so disproportionate that the defendant cannot even be excused. In other words, proportionality also forms the upper limit of self-defence-excess. For example, in the case where a senior man grabbed the defendant by the testicles, the defendant hit the man on the head with a heavy vase, as a result of which he died. The Dutch Supreme Court in effect held that the attack of the man may have caused the defendant to exceed the limits of what is proportional, but this was so disproportionate that it could not excuse.[80]

4.2. STATE OF MIND CAUSED BY THE ATTACK

The excessive force must have been a consequence of a specific state of mind directly caused by the attack. This requirement of double causation is strictest in the Netherlands, where it has been held that the excess should be the direct consequence of the affect, meaning that it was of overriding importance. If the excessive force, like hitting and kicking an aggressor who is lying on the ground, was not caused by an emotion like fear as a result of the attack, but simply out of feelings of aggression, induced by alcohol, not the attack, the excuse will be rejected.[81] In Germany, the attack must not necessarily be the predominant cause of the loss of control as it suffices that it is co-causal for the exceeding.[82]

The required states of mind can be distinguished into sthenic and asthenic feelings. Asthenic affects are passive feelings like fear, confusion and desperation that paralyse powers and make people weak, whereas sthenic emotions are active like anger, rage and indignation. The defence in the Netherlands covers both categories, whereas German law excludes the latter category.[83] The German provision on excess enumerates the asthenic affects that can give rise to the defence, whereas the Dutch provision uses a more generic term to include both types of emotion in all manifestations. German scholars often ground the exclusion of sthenic affects in the belief that it might set free latent feelings of aggression. Moreover, aggressive emotions generally are considered more dangerous and should therefore be restricted for the sake of the protection of (the aggressor's) legal interests.[84] Nonetheless, the difference between the Dutch and German defence is seriously mitigated because of the German rule that sthenic affects may also play a role, as long as the asthenic emotion is still also causal for the excessive use of force.[85]

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[79] 24 October 1919 RGSt 54, 56; 24 October 2001 NStZ 2002, 141.

[80] HR 8 April 2008, NJ 2008, 312.

[81] HR 13 June 2006, NJ 2006, 343; HR 31 March 2009, NJ 2009, 177.

[82] 21 March 2001 BGH NStZ 2001, 591; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 122.

[83] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 122.

It should be noted that individual characteristics of the defendant influence the availability of the excuse.[86] Arguably we can expect more from some and less from others. The excuse can be rejected because the specific defendant should have restrained himself. For example, a prison guard could not rely on the defence. Considering his profession, he should not have reacted to the blow to his face by punching the victim in the head after he was restrained on the floor.[87]

4.3. PARTIAL DEFENCES IN ENGLAND

Self-defence in an excusatory form is not available in England. In cases where the victim dies as a result of disproportionate defensive force, the unavailability of excess thus brings about a harsh mandatory sentence for the defendant. To avoid this, English law recognises two partial defences that can reduce a charge of murder to the less serious one of (voluntary) manslaughter.

4.3.1. Loss of control

The first of these partial defences is called loss of control. With the Coroners and Justice Act 2009, the defence of 'provocation' under section 3 of the Homicide Act 1957 was replaced in October 2010 by the very similar defence of loss of control. The defence has been said to consist of two tests.

The first, subjective test requires that the killing was the result of loss of self-control, and the loss of self-control was caused by a qualifying trigger like an attack or a provocation. Just as in self-defence-excess, a criterion of double causation applies.[88] The new defence no longer uses the word provocation but narrowly lists as a possible 'qualifying trigger' thing(s) said or done which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.[89] The striking of the term 'provocation' already indicates that the defence has shifted away from partially condoning anger. For example, the new defence excludes from it killing after losing one's temper or outrage due to sexual infidelity. At the same time, it is broadened by including fear of serious violence inflicted by the victim on the defendant or someone else as a qualifying trigger of the loss of self-control.[90] Like the emotion in self-defence-excess, the loss of self-control must be very severe. A simple reduction is insufficient.

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[84] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 992 and 995.

[85] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 995–997.

[86] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 332–333.

[87] Hof Den Haag 25 February 2009, ECLI:NL:GHSGR:2009:BH4016.

[88] R. Holton and S. Shute, 'Self-Control in the Modern Provocation Defence' Oxford Journal of Legal Studies (2007), p. 59.

A second, more normative test requires that the loss of self-control was in accordance with the reasonable man standard. The defendant is compared with the person of his sex and age, with a normal degree of tolerance and self-restraint and in the circumstances he was in.[91] Persons who lack sufficient self-control – such as a habitually aggressive person – will not be able to avail themselves of the defence.[92]

4.3.2. Diminished responsibility

The defence of diminished responsibility was originally created by section 2 of the Homicide Act 1957 in order to mitigate the very narrow English definition of insanity. The defence has now been modernised to work more closely with the current medical understanding of mental health problems by section 52 of the Coroners and Justice Act 2009. Just like loss of control, the major rationale for diminished responsibility is the mandatory life sentence for murder. It is however far less popular than loss of control, for it stigmatises the defendant as not being sane. The defence is only a concession to *abnormal* human frailties.[93]

This partial defence demands that the abilities to understand the nature of one's conduct, to form a rational judgment and to exercise self-control are substantially impaired.[94] The scope of abnormality was and still is wider than that of insanity under English law.[95] For example, 'irresistible impulse' is also included in the defence.[96] Obviously, a test of double causation also applies. The defendant must have killed because his mental faculties were substantially impaired as a result of an abnormality of mental functioning due to a recognised medical condition.[97]

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[89] Section 54(1)(b) of the Coroners and Justice Act 2009.

[90] Section 55(3), (4) and (5) of the Coroners and Justice Act 2009.

[91] Section 54(1)(c) of the Coroners and Justice Act 2009.

[92] R. Holton and S. Shute, 'Self-Control in the Modern Provocation Defence' Oxford Journal of Legal Studies (2007), pp. 58–60.

[93] J. Horder, 'Provocation and Responsibility' (Clarendon Press 1992), p. 162.

[94] Section 52 of the Coroners and Justice Act.

[95] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 612–615.

[96] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 607–608.

[97] G. Virgo, 'Diminished Responsibility Expanded' The Cambridge Law Journal (2003), pp. 541–542.

Diminished responsibility not only fills the gap left by the exclusion of self-defence-excess. Unlike most civil law systems, English law also does not recognise the defence of partial insanity or diminished capacity. This all-or-nothing approach to insanity makes the defence of diminished responsibility relevant in homicide cases falling short of complete insanity. Diminished responsibility does not require that capacities are totally impaired, merely that they are substantially impaired.[98] It can therefore be concluded that if English law were to recognise partial insanity and self-defence-excess, like German and Dutch law, there would hardly be any use any more for diminished responsibility. To many English scholars and practitioners, the better solution would even be to do away with the mandatory sentence for murder altogether. After all, if it were not for the mandatory sentence, both self-defence and the partial defences would not have been stretched to their limits.[99]

5. NECESSITY

Justified necessity applies in a situation of actual danger to legal interests, which danger can only be averted by infringing less valuable interests of third parties. Justified necessity should be distinguished from duress, which in civil law systems is often labelled as excusing or psychological necessity. The choice made in justified necessity is objectively right or at least the lesser of two evils. By contrast, duress is the acknowledgement that the defendant was under such a pressure that he could not reasonably be expected to abide by the law. He is therefore only excused for making the wrong, but understandable, choice.[100] Thus the person who is speeding to get his injured mother to the hospital can be juxtaposed with the person who is speeding because a criminal tells him to at gunpoint. The latter is a classic example of duress by threats.

Nonetheless, this distinction is not always self-evident, as both defences arguably revolve around a certain infringement of the freedom of choice of the actor. In England in particular, there is disagreement about whether cases should be dealt with under the doctrine of necessity or the similar 'duress by circumstances', where there is no express threat of 'do this or else' but the circumstances threatened death or serious injury unless the offence were committed. We will therefore have a brief look at the rationale and historical roots of justified necessity, before exploring the different requirements. In section 6 we will subsequently discuss the defence of duress.

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[98] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 251.

[99] J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (Oxford University Press 2005), pp 139–140.

[100] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 804–805.

5.1. RATIONALE AND HISTORY

Necessity is most easily understood as a justification of lesser evils. Faced with two unpleasant alternatives, the defendant decides to break the law in order to avoid a more serious evil to himself or others. In this conflict of interests, the defendant is justified for saving the prevailing interest. Saving the prevailing interest thus furthers the legal order.[101] Whereas self-defence is a response to an aggressor and is grounded for a large part in the individual autonomy, necessity implies choosing the lesser evil and is therefore primarily grounded in the collective good of the legal order. For instance, if the defendant saved his own life by breaking a window of a burning building, he is not justified because of a right to save his own life: he is justified because the legal order values his life over a window.[102]

It is however important to understand that justifying the defendant's behaviour because of a necessity situation has only been developed in the 20th century. There used to be quite some fear that the acceptance of justified necessity would undermine the validity and authority of rules. The defence was therefore not included in older criminal codes.[103] For instance, the legislator of the 1886 Dutch Criminal Code, which currently still applies, covered only psychological necessity in Article 40, as can still be deduced from the wording of the provision:

> 'He who commits an act as a result of an irresistible force is not criminally liable'.

Only in 1923 did the Supreme Court accept that necessity could also arise in the absence of an irresistible pressure, based on the choice in favour of the most valuable interest, rather than personal danger to life and limb.[104] The defendant, an optician, had sold a pair of glasses to a person who had apparently lost his. He sold them after opening hours, which was a criminal offence. The question was whether he was allowed to let his duty to help this person prevail over the duty to abide by the legal rule on opening times. The Court held that the duty to help should prevail and acquitted the defendant based on justified necessity, which was now held to be a part of Article 40 DCC.[105]

A similar development occurred in Germany. The old Criminal Code of 1871 only included a provision similar to duress.[106] The lack of a general defence of necessity meant, amongst other things, that medically indicated pregnancy terminations could be excused for the mother, but the doctor could rely on no such exculpation, even though the conduct was viewed as appropriate. This lacuna prompted the Supreme Court in 1927 to apply necessity to the doctor who performed an abortion on a woman who became suicidal because she was pregnant. Like the Dutch Supreme Court had done a few years ago, the defence was based on the principle of weighing of interests, accepting thereby necessity as a justification.[107] However, it was not until 1975 that the current §34 GCC on justified necessity entered into force.

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[101] D. Ormerod, 'Smith & Hogan: Criminal Law' (Oxford University Press 2005), p. 315.

[102] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 138.

[103] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), pp. 100–101.

[104] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 177.

[105] HR 16 October 1923, NJ 1923, p. 1329; M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), pp. 230–231.

[106] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 723–725.

In contrast to the development in the Netherlands and Germany, in England, the fear that a broad acceptance of justified necessity would weaken the authority of the law persists to this day. Thus the scope of necessity in England remains unclear, also due to the restrictive (offence-by-offence) approach of courts, the lack of parliamentary intervention, and finally the confusion stemming from the interchangeable use of necessity and duress (by circumstances).

5.2. CRITERIA

The criteria for necessity are clearly depicted in §34 GCC:

> 'A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.'

In order for necessity to justify a criminal offence, there must be a present danger for a legitimate interest. Next, similarly to self-defence, the defence must be capable of ending the danger and be the least intrusive means of aversion (subsidiarity). Finally and most importantly, the defendant should choose the lesser of two evils (proportionality).

5.2.1. *Imminent danger of legitimate interest*

In principle, all legal interests may give rise to protection. The German provision on necessity lists some legal interests but makes clear that a danger to any other legal interest may also qualify.[108]

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[107] 11 March 1927 RGSt 61, 242; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 676.

[108] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 680; T. Fisher (ed.), 'Strafgesetzbuch und Nebengesetze' (C.H. Beck Verlag 2009), p. 305.

The danger or conflict of interests can arise as a result of human conduct but it can also arise from natural causes, like a threatening fire or flood.[109] The origin of the danger does not matter. What is important is that the danger or conflict must give rise to a necessity to act immediately. If official authorities are able to counteract the danger or solve the conflict there is no imminence.

The scope of imminence is broader than in the context of self-defence. Whereas self-defence requires an *attack*, which means that at least an immediate situation of infringement of a legal interest is at hand, necessity requires only an imminent *danger*. An attack may not yet be imminent, whereas the danger already is. German courts have therefore accepted that the danger is imminent if harm is not yet directly pending, but a later averting of that danger will not be possible or only with much greater risk.[110] This is also the Dutch[111] and English[112] perspective on the matter.

There is consensus that some time for reflection is allowed in necessity. This follows from the requirement of meticulously weighing the competing interests and carefully considering whether there are alternatives to committing an offence.[113] Nonetheless, imminence has been given an upper limit by arguing that situations of general necessity that linger over a longer period or affect many are excluded from necessity. There has to be a concrete and more or less acute situation of necessity. The general lack of housing, therefore, does not allow for squatting.[114] Nor does poverty allow for stealing.[115] It is argued that an essential feature of defences is that they apply only to exceptional circumstances where the implications of wrongfulness and blameworthiness are not warranted. Hence, in recurring situations defences cannot solve what the legislator should solve.[116]

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[109] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 110.

[110] 11 March 1927 RGSt 61, 242; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 732–733.

[111] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 246.

[112] Compare R v Hudson and Taylor [1971] EWCA Crim 2; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 208.

[113] HR 10 February 1987, NJ 1987, 662; 25 March 2003 BGHSt 48, 255; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 725.

[114] Southwark London Borough Council v Williams [1971] 2 All ER 175; HR 12 July 2011, NJ 2011, 578.

[115] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 807; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 306–307.

[116] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 332; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 748 and 733–774.

5.2.2. *Subsidiarity*

As in self-defence, the means of aversion must be adequate and the least intrusive means to end the danger. The principle of adequacy is not that strict in most legal systems. After all, the defendant who exceeded the speed limit to get a person to the hospital did not know whether this would save that person. It is only required that the violation of the norm at least increases the chances of saving the interest of higher value.[117]

The other aspect of subsidiarity, the use of the least intrusive means, is applied more strictly. For example, if an ambulance is directly available, it is not necessary to exceed the speed limit to get someone to the hospital. In a German case, a journalist who took a knife on board a passenger aircraft to expose the failure of security measures could not rely on necessity, since carrying the knife on board was no longer necessary for the goal. He could have made his point by giving the knife away after passing security checks. By bringing the knife on board, he actually created a danger.[118] A Dutch journalist who exposed failing security measures in an airport was also convicted for carrying a false employee pass after his investigative reports had ended, because this was no longer necessary.[119]

Alternatives to committing the offence include legal remedies or getting official help.[120] Moreover, when the legislator has provided for clear exceptions to a legal prohibition and/or the possibility to apply for a permit or exemption, this generally excludes other means of solving the conflict of interests.[121] On the other hand, the defendant may still be justified in case of exceptional circumstances that the legislator did not foresee. A good example of this possibility is the Dutch medical cannabis case.[122] The case was as follows: two defendants, a person suffering from multiple sclerosis (MS) and his wife, were charged with cultivating cannabis. This has always been criminal in the Netherlands, tolerated by the Public Prosecution's Service only in small quantities for individual consumption. The Drugs Act only allows for a medical exemption to the injunction, which, according to the Public Prosecutor, implies that necessity is precluded. The defendants did not ever apply for the exemption. The Court of Appeal and Supreme Court allowed the defendants to rely on necessity nevertheless, because the defendants knew that applying for the exemption would be unsuccessful, as only companies could be given a permit. In other words, there was no real alternative available to the defendants. Necessity was accepted because the circumstances were held to be exceptional. First, it was established that cannabis helped to relieve pain and prevent spastic seizures and that at a certain stage this is the only substance that can help MS patients. Second, it was established that the medicinal cannabis available in pharmacies did not have the desired effect. Third, the danger of cannabis sold in 'coffee shops' was that it was full of fungi, bacteria and pesticides, to which MS patients are very sensitive. Taking all of this into account, both the Court of Appeal and the Supreme Court held that the conflict of interests – the criminal offence versus the relieving of pain and prevention of spasticity – could be settled in favour of the latter. This means the defendants were (from then on) justified to grow cannabis.[123]

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[117] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 734; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 683.

[118] 25 October 2005 OLG Düsseldorf NStZ 2006, 243.

[119] Hof Amsterdam 28 April 2011, ECLI:NL:GHAMS:2011:BQ2981.

[120] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 764.

[121] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 164.

[122] HR 16 September 2008, NJ 2010, 5.

This case demonstrates that even in situations of strict and clear legislation, necessity should not be precluded because there will always be situations that the legislator did and could not foresee.

5.2.3. *Proportionality*

Since necessity is by definition a defence based on a balance of evils, proportionality plays a decisive role. The actor should choose the lesser of two evils. This does not, however, consist of an abstract valuation of legal interests, but a concrete test based on the circumstances of the case. All interests that are directly and indirectly involved should be weighed. In particular the following must be taken into account: the nature, origin, intensity and likelihood of the danger, the nature and scope of the threatened damage, the relationship in value and rank between colliding interests, the benefits for society, prior fault, the possible irreplaceability of the damage and the chance of saving one or both interests.[124]

The exact degree of proportionality remains controversial. Some submit that the balancing exercise requires that the protected interest substantially outweighs the sacrificed interest,[125] whereas others argue that the difference between the conflicting interests must not be great, only evident.[126] Some include in necessity that the saved interest must at least be equal to or greater than the sacrificed interest.[127] This means that situations in which interests of equal value conflict can also be solved under necessity.

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[123] See also: J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 307–308.

[124] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 127; M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 252.

[125] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 127. Compare 'substantially' (*wesentlich*) in 34 GCC.

[126] M. Bohlander, 'Principles of German Criminal law' (Hart Publishing 2009), p. 113; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 766–767.

However, according to a traditional view, there is one major exception to this: lives can never be traded against each other. Necessity is principally rejected because a valuation of lives is prohibited. Every life has the same value, which, for example, means that a doctor may not sacrifice a patient with small chances for survival to save one with high chances. Nor may the lives of some be sacrificed to save the lives of many.[128] The refusal to apply necessity in the case of one life versus another is also largely based on the principles of human dignity and autonomy. This explains, for example, why the German Constitutional Court held unconstitutional and void §14 (3) of the Traffic Security Act 2005 that would permit the shooting down of a hijacked plane to prevent it from being used for a terrorist attack like those of 9/11. The Court refused to consider the fact that the passengers in such a situation were already doomed. The innocent[129] passengers would become mere means to an end, and by using people as objects, the human dignity and right to life, which enjoy the highest protection, would be violated.[130] The Court thus put much weight on the prohibition on the quantification and valuation of lives, rejecting the perspective that victims, who are designated to die in any event, may be sacrificed. Nonetheless, this decision does not necessarily imply that liability should follow. According to some scholars there could still exist a *supra*-legal *excusatory* defence.[131] Others reject this solution in favour of justifying the shooting down.[132]

In any event, the German position shares in this respect the English approach expressed in *R v Dudley and Stephens*. However, recently there seems to have been some change in the English law of necessity. The ruling in the well-known case of *Re A (Children)* is often interpreted as that a necessity plea is now possible to a charge of murder. In this case the court was asked to rule on the legality of a proposed surgery of conjoined twins. Jodie and Mary were conjoined at the abdomen and both sisters relied on Jodie's heart. The two evils were the following: if Mary and Jodie would be separated, Mary would surely die, as she was incapable of independent existence; however, if they were not separated, Jodie's heart would eventually fail within months, leading to the death of both sisters. The Court of Appeal acknowledged that *R v Dudley and Stephens* was frequently interpreted as authority for the rule that necessity could never apply to a charge for murder. However, the Court decided that the policy considerations behind the decision of *R v Dudley and Stephens* did not apply to the present case. Here are some crucial arguments by Lord Justice Brooke who based his decision squarely on the grounds of necessity.

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[127] G.A.M. Strijards, 'Strafuitsluitingsgronden' (Tjeen Willink 1987), pp. 49–50.

[128] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 738–739; A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 686.

[129] If the aeroplane is unmanned or only occupied by persons who want to use it as a weapon, it may be shot down. This was also the case in 2003 when a confused individual threatened to use a hijacked sports plane as a weapon on Frankfurt. Fortunately, the threat was not executed and the plane landed safely. See: J. Kersten, 'Die Tötung von Unbeteiligten – Zum verfassungsrechtlichen Grundkonflikt des §14 III LuftSiG' Neue Zeitschrift für Verwaltungsrecht (2005), p. 661.

[130] 15 February 2006 BverfG NJW 2006, 751. See also: A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 687.

[131] See: A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2014), Vorbem. §§32ff Mn 117.

[132] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), pp. 112–113.

R v A (Children) (conjoined twins) [2000] EWCA Civ 254

> '[The case of *R. v Dudley and Stephens*] has sometimes been taken as authority for the proposition that necessity can never under any circumstances provide a legal justification for murder. While it is true that a passage in the speech of Lord Hailsham in *R v Howe* [1987] 1 AC 417 at p 429C-D might be interpreted to this effect, in my judgment neither that passage nor a similar passage in Lord Mackay of Clashfern's speech at p 453 C-D displays any evidence that they had in mind a situation in which a court was invited to sanction a defence (or justification) of necessity on facts comparable to those with which we are confronted in the present case.
>
> [...]
>
> I have considered very carefully the policy reasons for the decision in *R v Dudley and Stephens,* supported as it was by the House of Lords in *R v Howe.* These are, in short, that there were two insuperable objections to the proposition that necessity might be available as a defence for the Mignonette sailors. The first objection was evident in the court's questions: Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? The second objection was that to permit such a defence would mark an absolute divorce of law from morality.
>
> In my judgment, neither of these objections are dispositive of the present case. Mary is, sadly, self-designated for a very early death. Nobody can extend her life beyond a very short span. Because her heart, brain and lungs are for all practical purposes useless, nobody would have even tried to extend her life artificially if she had not, fortuitously, been deriving oxygenated blood from her sister's bloodstream.
>
> It is true that there are those who believe most sincerely – and the Archbishop of Westminster is among them – that it would be an immoral act to save Jodie, if by saving Jodie one must end Mary's life before its brief allotted span is complete. For those who share this philosophy, the law, recently approved by Parliament, which permits abortion at any time up to the time of birth if the conditions set out in Section 1(1)(d) of the Abortion Act 1967 (as substituted) are satisfied, is equally repugnant. But there are also those who believe with equal sincerity that it would be immoral not to assist Jodie if there is a good prospect that she might live a happy and fulfilled life if this operation is performed. The court is not equipped to choose between these competing philosophies. All that a court can say is that it is not at all obvious that this is the sort of clear-cut case, marking an absolute divorce from law and morality, which was of such concern to Lord Coleridge and his fellow judges [in *R v Dudley and Stephens*].

> There are sound reasons for holding that the existence of an emergency in the normal sense of the word is not an essential prerequisite for the application of the doctrine of necessity. The principle is one of necessity, not emergency.
>
> […]
>
> There are also sound reasons for holding that the threat which constitutes the harm to be avoided does not have to be equated with "unjust aggression" […] None of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect it is different from the doctrine of private defence.
>
> If a sacrificial separation operation on conjoined twins were to be permitted in circumstances like these, there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases (at the risk of other people's lives). Such an operation is, and is always likely to be, an exceptionally rare event, and because the medical literature shows that it is an operation to be avoided at all costs in the neonatal stage, there will be in practically every case the opportunity for the doctors to place the relevant facts before a court for approval (or otherwise) before the operation is attempted.
>
> According to Sir James Stephen, there are three necessary requirements for the application of the doctrine of necessity:
>
> (i) the act is needed to avoid inevitable and irreparable evil;
> (ii) no more should be done than is reasonably necessary for the purpose to be achieved;
> (iii) the evil inflicted must not be disproportionate to the evil avoided.
>
> Given that the principles of modern family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary, I consider that all three of these requirements are satisfied in this case.'

Thus a balance was struck in favour of separation. By emphasising the fact that Mary was designated to die and was the source of the danger, the court distinguished this case from other similar cases, like that of *R v Dudley and Stephens*, where someone else could have been sacrificed too.[133] The cabin boy was selected because he was weak and had no children, but he was an autonomous person who posed no threat to the defendant.[134]

6. DURESS

The defence of duress (or psychological necessity) encompasses situations where the defendant was under such a pressure that he could not reasonably be expected to abide by the law. Traditionally, these situations arise when the defendant was threatened that if he did not commit the offence, he or someone close to him would be killed or seriously injured. Duress can however also arise out of circumstances, similarly to necessity.[135]

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[133] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 125.

[134] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 805.

6.1. RATIONALE

Duress is largely based on the rationale of psychological pressure.[136] Duress concerns cases where the actor through external circumstances is abnormally coerced in his freedom to choose, as a result of which he cannot be expected to act in conformity with the norm.[137] Related to this rationale is the view of the defence as a concession to human frailty in cases where virtually no one can be expected to act differently. The law cannot demand self-sacrifice or heroism from people.[138]

It is also argued that because the human urge for self-preservation is irresistible, the law cannot influence the defendant to act differently. Criminal law should not be applied against the person who will not be influenced by it. The threat of punishment will not be able to change the actor from acting differently, as was already illustrated by the Kantian example of the shipwreck case. The actor will choose the possibility of a death penalty in the near future over a certain and imminent death. In other words, duress excuses the actor because special deterrence is ineffective against him.[139]

6.2. CRITERIA

Although the national formulas of duress differ, the criteria are similar in most legal systems. Thus §35 (1) GCC provides:

> 'Whoever, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply to the extent that the perpetrator could be expected under the circumstances to assume the risk,

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[135] This distinction between duress by threats and duress by circumstances is still in use in English law, and was also made in German and Dutch law, although they are now treated under the general heading of duress.

[136] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 210.

[137] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 156; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 964–966 and 1014.

[138] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 317.

[139] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 965–966, 972, 977–978, 987.

> in particular, because he himself caused the danger or was under a special legal obligation to do so; the sentence may be mitigated pursuant §49 (1) unless the offender was required to accept the danger because of special legal obligation to do so.'

The defendant committed the offence because he was impelled by an imminent danger or threat to important legal interests, such as his life and limb. Therefore, he could not be expected to have acted differently. Like in other defences, prior fault and the special position of the defendant influences the scope of duress. So does proportionality, which places an upper limit on what offence can be excused in comparison to the threat.

6.2.1. Legitimate interests

In England and Germany, the danger that is averted must be directed against life, limb or personal liberty of the defendant or that of a relative or a person who is close to him. This limited list of interests is explained by reference to the exceptional character of the defence and its psychological rationale, which presupposes that only the gravest threats can compel the defendant to break the law.[140]

In Dutch law a contrary approach is followed. Legal interests are not excluded from being protected under duress a priori, but the scope of the defence is limited through the other conditions, such as proportionality. It is clear that the more serious and personal the nature of the threat, the more likely it is that the actor could in fact not resist. Secondly, the subsequent normative question is whether the defendant *should* have resisted. The defendant will therefore also not be excused for committing a serious offence if he was compelled to do so by mere moral pressure.[141] Hence, the difference between the two approaches is mitigated, just as in self-defence. There will hardly be a difference in outcome. In all legal systems, the rule is that the more serious the crime the actor is coerced to commit, the more irresistible the threat needs to be.[142]

6.2.2. Imminent danger

Similarly to necessity, the imminent threat or danger need not originate from human action; it can also originate from objects of nature. Any extraneous force, urge, threat or pressure to which a legal subject cannot offer resistance suffices. Thus any coercion that arises from characteristics of the defendant himself does not qualify for duress.[143] For example, defendants who were having suicidal thoughts because of their imprisonment were not excused for breaking out of prison.[144] In another case, by contrast, the defendant broke the law because of fear that his wife would otherwise commit suicide. Duress was accepted because the suicidal tendencies were external to the defendant.[145]

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[140] R v Hasan [2005] UKHL 22; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), pp. 123–124.

[141] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), pp. 97–99, 177–178, 187, 191 and 320–321.

[142] R v Abbott [1977] AC 755; J. Horder, 'Excusing Crime' (Oxford University Press 2006), p. 95.

Like in self-defence-excess, there must be a causal connection between the external event and the pressure, as well as between the pressure and the offence. The actor committed an offence because he could not reasonably resist the pressure and this lack of control must be caused by something that is generally accepted as such a cause.[146]

Since duress is about a pressure which the defendant reasonably could and should not resist, he is compared to the reasonable person. The question is what can reasonably be required of the defendant and to what extent he should have resisted the urge to commit the offence. First of all, the pressure need not be absolute or insurmountable. The defendant is not compared to persons of special virtue: heroism is not required.[147] Secondly, certain characteristics of the defendant are taken into account when assessing whether or not he should have resisted the pressure. In England, characteristics such as pregnancy, age, gender and even mental disorders are taken into account.[148] In the Netherlands, age also limits what can legitimately be expected of a person. The case where a 17-year-old boy was being sexually abused by an older man is often mentioned. He wanted to end the abuse when he got a girlfriend, but the man wanted to hear nothing of it and threatened to tell his parents. In despair, the boy attacked the man with an axe, seriously injuring him. He was excused on grounds of duress, taking into account the childlike nature of the boy.[149]

6.2.3. *Subsidiarity*

The criminal offence must be capable of ending the danger and at the same time be the least intrusive means available. The conditions are similar to those in necessity. There must have been no evasive action the defendant could reasonably take, such as going to the authorities. For example, the person who receives death threats in relation to testifying against a criminal can attempt to receive official protection.[150]

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[143] D. Ormerod, 'Smith & Hogan: Criminal Law' (Oxford University Press 2005), p. 301; M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 323.

[144] R v Andrew Rodger and Keith John Rose [1997] EWCA Crim 1760.

[145] R v Martin (Colin) [1988] EWCA Crim 2.

[146] A.A. van Dijk, 'Strafrechtelijke aansprakelijkheid heroverwogen' (Maklu 2008), p. 23.

[147] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 739 et seq., 789–790 and 795–796.

[148] R v Bowen [1996] EWCA Crim 1792; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 207.

[149] Rb. Rotterdam 3 April 1941, NJ 1941, 665. Besides age, the Dutch judge takes into account education, personality, societal status, development and so on. See: M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 193.

Just like in necessity, there can be situations where the defendant has to suffer the danger. This is usually based on a position or office, which requires the subject to protect individuals and the common good, such as police officers, firemen, doctors, sailors, and so on.[151] The dangers one is required to face must of course be related to the profession or duties of the actor.[152] The exact scope of the obligation must be found by reference to the purpose of the respective office, in other words, the interest that the office protects and the dangers typically concerned with its exercise. There is no general duty identical to all these positions.[153]

Arguably a duty to face the danger can also be grounded in prior fault. In England, for example, this is usually discussed in the context of people joining a criminal enterprise or becoming indebted to drug dealers who have a violent reputation. As a rule, duress is precluded when, because of the voluntary association with criminals, the defendant foresaw or should have been able to foresee the risk of being subjected to any compulsion by threats of violence.[154]

6.2.4. *Proportionality*

Duress does not require a strict test of proportionality. Whereas for justified necessity the lesser evil has to be chosen, duress merely demands that the offence is not disproportionate to the threat averted. It is not required for the defendant to have done the right thing: his actions merely need to be understandable. On the other hand, there is still an upper limit on proportionality because of the normative and exceptional character of duress. When the use of aversive measures goes beyond this upper limit, the pressure can only be taken into account in sentencing. For example, killing in order to prevent reparable bodily injury cannot be excused.[155]

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[150] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 966; M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden' (Wolf Legal Publishers 2006), p. 191.

[151] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), pp. 127–128; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 979.

[152] 14 June 1938 RGSt 72, 246; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 980.

[153] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), 127–128.

[154] R v Hassan [2005] UKHL 22 and R v Ali [2008] EWCA Crim 1726. See: A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 209.

[155] D. Ormerod, 'Smith & Hogan: Criminal Law' (Oxford University Press 2005), pp. 268 and 324; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 980–986.

The weighing of interests is conducted in a very similar way as in necessity. The judge has to take into account the threatened and infringed legal interest as well as the nature, degree and gravity of the danger. For example, a very uncertain danger of bodily harm will not likely excuse certain death of another.[156]

A separate question is whether duress should also apply to homicide. In the context of necessity it was already made clear that in most legal systems the sanctity of human life brings about a prohibition on the weighing of human lives. As a result, Dutch and German law favour the application of duress over that of necessity as it communicates merely that the defendant should not be blamed for sacrificing the victim. Clearly, duress is only accepted in a murder charge in extreme circumstances.[157] But there are no convincing reasons to exclude duress from homicide a priori.

Only in England is a different perspective taken on this issue. Duress cannot apply to murder. The limitation is considerable, given the broad scope of murder in English law, which includes the intentional infliction of grievous bodily harm resulting in death. Unlike other legal systems, the English system makes no concession to human frailty and requires a heroic self-sacrifice. Like in necessity, it was feared that otherwise this would provide criminals with a formidable defence, leaving the innocent victims without protection. Thus, under no circumstances should the law recognise that anyone has the liberty to choose that one innocent citizen should die rather than another.[158] There are numerous references of ancient and contemporary authority against recognising a defence for murder based on the sanctity of life and the desirability of dealing with hard cases by executive discretion, like in *R v Dudley and Stephens*. The rule was explicitly recognised by the House of Lords in the 1985 case of *R v Howe* where it was decided that if a change regarding the current law was to be made, this should be done by Parliament.[159]

Currently, it is in question in England whether the rule against the application of duress to murder still exists. As mentioned, the ruling in *R v A (Children)* is often interpreted as now making a necessity plea possible to a charge of murder.[160] As necessity and duress by circumstances are considered interchangeable defences in English case law, it is argued that duress should apply to murder as well.[161] The courts however still preclude duress to murder, admitting that this may lead to undesirable results. For example, a 13-year-old boy who participated in a murder with his father out of fear of his violence could not rely on duress.[162] In any event, most English scholars have argued in favour of making duress to murder available.[163]

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[156] M.M. Dolman, 'Overmacht in het stelsel van strafuitsluitingsgronden'(Wolf Legal Publishers 2006), pp. 189–191.

[157] HR 6 December 2011, ECLI:NL:HR:2011:BP9394, in which case the defendant killed a very young child.

[158] R v Howe [1986] UKHL 4; A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 205–213.

[159] R v Howe [1986] UKHL 4. A. Ashworth and J. Horder, 'Principles of criminal law'(Oxford University Press 2013), pp. 130 and 205–213.

[160] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 420.

7. INSANITY

Insanity is a defence that exculpates the defendant who, due to a mental disorder, did not have the capacities at the time of committing the offence to be held responsible in law. Article 39 DCC gives a good definition of this defence:

> 'He who commits an act for which he cannot be held responsible by reason of an arrested development or pathological disorder of his mental capacities is not criminally liable.'

From this provision we may already deduce that labelling this defence as 'insanity' does not cover its true meaning. The concept has little to do with madness, or with any medical definition of insanity; the defence is given a purely legal definition encompassing several kinds of mental disorders that may negate, or at least diminish the criminal liability of the actor.

7.1. RATIONALE

Insanity has basically a twofold rationale. First, it guarantees that those that cannot be held responsible for their actions are not punishable. Arguably, goals of prevention and retribution can only be served if human subjects have basic capacities of understanding and controlling their conduct. If these mental capacities are impaired due to a mental disorder it becomes impossible to hold them responsible under the criminal law. Moreover, criminal law cannot communicate with those who do not understand the norms. The basic capacities presuppose that there can be communication between the legal system and the defendant.[164] As a human being normally possesses these capacities, the law makes the assumption that acts are voluntary and actors are sane. Insanity is the negation of this assumption.

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[161] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 803; G.P. Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' Israel Law Review (1973), p. 373.

[162] R v Wilson [2007] 2 Cr App R 31. He could only rely on a partial defence.

[163] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 744.

[164] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 24–25 and 233–234.

Secondly, the insanity defence ensures that the public is protected against those defendants. In almost all legal systems, the insane defendant can be compulsorily admitted to and/or treated in a mental hospital.[165] By framing insanity as an excuse, courts can impose measures upon these perpetrators of wrongful acts. These measures include the deprivation of the defendant's freedom for an indefinite time.[166] As long as the danger remains and/or treatment is necessary, the defendant can be detained in a mental hospital.[167]

7.2. CRITERIA

Although the conditions differ in legal systems, the insanity defence essentially requires that the offence should be attributable to the mental disorder. This means that, first of all, it needs to be established that the defendant was suffering from a relevant mental disorder when he committed the offence. Secondly, it is assessed whether the disorder should be deemed the legal cause of the offence. This question is partly psychological, for it takes into account the state of mind of the defendant, generally through the assessment of expert advice on how the disorder has affected the defendant. It is however also a legal, normative question, whereby more factors are relevant than the pertinent disorder and the effect it presumably had on the defendant. For example, there may be countervailing reasons against accepting the defence, such as the prior fault of getting in a situation where the defendant lost his mind.[168] One may think here of the use of drugs that caused psychosis.

7.2.1. Mental disorder

It is obvious that in order to be labelled insane, the defendant must have suffered from a mental disorder. This 'mental disorder' has been formulated in many different ways in national law. In England, for example, section 1(2) of the Mental Health Act 1983 defines a mental disorder as 'any disorder or disability of the mind'. The common law defence of insanity, by contrast, refers to a 'disease of the mind'. Article 39 DCC refers to two manifestations of mental abnormality, namely pathological disorder and arrested development of the mental faculties, which reflects a difference in origin of the disorder. The latter category includes those cases of idiocy and imbecility that are congenital or originated at a young age. By contrast, a pathological disorder is believed to occur later in life.[169] This separation also aims to distinguish deviations that have a physical origin from those that do not. The German defence lists four categories of mental disorders. The wording of §20 GCC, especially the last category, is wide enough to cover all relevant mental disorders:

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[165] Section 37 of the Mental Health Act 1983; Article 37 and 37a DCC and §63 GCC.

[166] See: Article 38^e DCC; §67d GCC and Section 41 of the Mental Health Act 1983.

[167] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 141–143.

[168] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 349–351.

> 'Whoever upon commission of the act is incapable of appreciating the wrongfulness of the act or acting in accordance with such appreciation due to a pathological emotional disorder, profound consciousness disorder, mental defect or any other serious emotional abnormality, acts without guilt.'

Classic examples of pathological mental disorders are physical cerebral traumata, dementia, schizophrenia and manic depression.[170] Other disorders like neuroses, perversions and personality disorders are categorised in Germany in a final category of 'other serious mental abnormalities'. This can include pyromania, paedophilia, kleptomania and so on.[171] It may be feared that such a wide scope of possible disorders may lead to a defence that excuses anyone. However, it is clear that only very severe disorders will qualify.[172] Usually, the defendant is argued to have been able to exercise restraint and that he was therefore still able to appreciate the wrongfulness of his conduct.[173]

The category of 'profound consciousness disorder' can be distinguished in an affect or intoxication. An affect is 'an explosive reaction based on an extreme emotional state where no deliberate decision-making occurs anymore, for example, extreme rage, hate, shock, panic or fear.'[174] Dutch law excludes such affects from insanity. These states of mind can be taken into account in self-defence-excess.[175] The impossibility of taking sthenic affects, like revenge and rage, into account under self-defence-excess in German law thus in part explains this wider scope of insanity. Nevertheless, the theoretical possibility that an affect qualifies as a disorder under the defence does not mean insanity will also be accepted. A complete exculpation is limited in German case law only to very extreme cases of affects, which must after all be 'profound'. In practice, affects are most often only mitigated under the defence of diminished capacity.[176]

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[169] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 345–346.

[170] M. Bohlander, 'Principles of German Criminal law' (Hart Publishing 2009), p. 133.

[171] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 897–898.

[172] 23 September 2009 BGH NStZ-RR 2010, 7.

[173] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 898–899.

[174] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 133.

[175] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 346.

[176] A. Schönke and H. Schröder, 'Strafgesetzbuch Kommentar' (C.H. Beck Verlag 2006), p. 412.

Similarly, as will be discussed below, intoxication can only exceptionally qualify in German law as a disorder that can lead to the acceptance of insanity.

7.2.2. Impaired capacities

The insanity defence requires that the offence is attributable to the mental disorder. All legal systems aim to explain the offence by reference to the disorder, but they follow a different approach. In England and Germany, the offence is explained through the impairment of the defendant's capacities. This effect of the disorder is the connection between disorder and offence, bringing about a two-staged test. For example, the defendant committed the offence because (i) he did not know what he did was wrong, and he did not know what he did was wrong because (ii) he suffered from a mental disorder, like dementia.

By contrast, Dutch law directly seeks to explain the offence by reference to the disorder. There is no specific affect required. As a result, more attention is paid to the required degree of causation between the disorder and the offence.[177] Secondly, a more explicit additional (normative) condition of attribution applies. A disadvantage of the lack of references to incapacities is that it neglects that insanity is a defence of incapacity by virtue of mental disorder. On the other hand, the Dutch focus on 'legal attribution' may reflect better the normative character of the defence by making clear that there are more factors relevant than the effect of the disorder on the defendant's capacities.[178]

In German law, the offender is excused when the mental disorder made him incapable of appreciating the unlawfulness of the actions or of acting in accordance with this appreciation. The two alternatives are generally described as being that the defendant lacks the capacity of insight and restraint. Thus the defence covers not only evaluative or cognitive incapacities, but also volitional incapacities. Obviously a perpetrator can know that what he does is wrong, but be unable to restrain himself and act accordingly.[179] It should however be noted that the capacity of restraint is not easily rejected. The threshold is only met when all of the defendant's powers could still not bring about motivation to act in conformity with the norm.[180]

By contrast, in English law, the insanity defence is limited to evaluative or cognitive capacities. It only applies if the defendant was unaware of the nature and quality of his act(s) or if he did not know that what he was doing was wrong. Hence, volitional incapacities are not recognised as a defence. It has been proposed to include in the English defence of insanity an additional alternative criterion that resembles the incapacity of restraint, namely a test of irresistible impulse. If desires are sufficiently strong for an agent of good character not to be capable to resist them, the defendant ought to be provided with a defence.[181] However, this test has always been rejected because it is feared that it is extremely difficult or even impossible to distinguish between an impulse which is irresistible because of insanity and one that is irresistible because of greed, jealousy and so on.[182] As a result, an irresistible impulse has been adopted in the English defence of diminished responsibility.[183]

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[177] A.W.M. Mooij, Handeling, wilsvrijheid en toerekeningsvatbaarheid' Delikt en Delinkwent (2004), p. 1085; M. Bosch, 'Beginselen van strafrecht' (Kluwer 2008), pp. 167, 173 and 203.

[178] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 348.

[179] This should, of course, not be confused with duress. In insanity the origin of the pressure lies within the defendant, in duress there is an external factor.

[180] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 899–900.

The narrow scope of the insanity defence in England can be largely explained by the fact that the English rules on insanity originate from *R v M'Naghten* back in 1843. Daniel M'Naghten attempted to assassinate the British Prime Minister, but fired a pistol at his secretary's back, who died five days later.[184] Following the public outcry as a result of his acquittal based on insanity, the House of Lords gave some guidelines (now known as the M'Naghten Rules) to limit the defence. The reluctance to allow insanity as an excuse and the desire to incapacitate dangerous perpetrators has always shaped the English doctrine on insanity.

7.2.3. *Attribution and prior fault*

By contrast to the specific impairment of capacities, Dutch law directly seeks to explain the offence by reference to the disorder. Although cognitive and volitional capacities have also been identified in the Netherlands as conditions of sanity, the defence primarily deals with the question of whether the offence should be attributed to the defendant, given the fact that it was committed under the influence of the mental disorder. The criterion of attribution makes clear that the assessment of the defence is in the end a legal, normative decision.[185] This much is also accepted in the other two systems.[186] For example, in England, the greater the fear of recidivism, the more likely a finding of insanity will follow. A judge can, but is not required to, excuse the defendant.

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[181] V. Tadross, 'Criminal Responsibility' (Oxford University Press 2005), pp. 341 and 346.

[182] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 325. See also: R v Byrne [1960] 3 All ER 1.

[183] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 727–729.

[184] R v M'Naghten [1843–1860] All ER Rep 229.

[185] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 347–348.

[186] C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), pp. 899–900; A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 718–719.

The most clear-cut examples of when a judge would not excuse are cases of prior fault. If the defendant is to blame for becoming mentally disordered, there might be a causal connection, but the defence will be rejected.[187] Consider, for example, the Dutch case of the defendant who became so paranoid as a result of taking cocaine that he killed his grandmother. The court not only held that it was general experience that this substance is dangerous and can affect the will, but also held that the defendant had already experienced strange effects from the taking of cocaine beforehand. Prior fault reasoning was therefore easy to construct.[188]

7.3. DIMINISHED CAPACITY

A separate question is what to do when the defendant's capacities have been impaired by the disorder, but not to the extent of legal irresponsibility. The disorder was for example not severe enough to conclude he should be excused. In the Netherlands and Germany, the defendant can then rely on the defence of diminished capacity. In Germany, this is made explicit in §21 GCC:

> 'If the capacity of the perpetrator to appreciate the wrongfulness of the act or to act in accordance with such appreciation is substantially diminished upon commission of the act due to one of the reasons indicated in §20, then the punishment may be mitigated pursuant to §49 subsection (1).'

In the Netherlands this is accepted too, notwithstanding the fact that the Dutch Criminal Code does not imply this and the legislator did not envisage it.[189] By contrast, in English law, insanity is considered an all-or-nothing defence. The aforementioned partial defence of diminished responsibility only applies to the offence of murder. However, like any defendant who falls just outside the scope of a complete defence, the sentence can and is usually diminished, provided the judge has that discretion.[190]

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[187] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 349–350.

[188] HR 9 June 1981, NJ 1983, 412.

[189] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 347.

[190] Attorney-General's Reference (No. 37 of 2004) [2004] EWCA Crim 1854; C. Roxin, 'Strafrecht Allgemeiner Teil – Band I Grundlagen – Der Aufbau der Verbrechenslehre' (C.H. Beck Verlag 2006), p. 902.

8. INTOXICATION

What should we do with people who claim they did not have a sufficient degree of control over their actions, because they were drunk or otherwise intoxicated? The attitude of society as regards intoxicants, especially alcohol, has always been ambivalent. Whereas driving under the influence of alcohol is (nowadays) regarded as very culpable, drinking itself is (still) seen as socially acceptable conduct. The legal problems are just as ambivalent. Dogmatic consistency collides with pragmatic concerns on law and order. On the one hand, it is accepted that the intoxication may rob the defendant of his ability to be aware of and appreciate danger correctly. On the other hand, it is commonly rejected that the defendant should be able to benefit from the fact that he created these circumstances himself. A perpetrator should not be allowed to escape liability if he became intoxicated with a view to being able to rely on a defence against what he is subsequently charged with.

This ambivalence has in most legal systems resulted in a limited exculpatory effect of intoxication. Although the results are very similar, the way in which these results are reached sometimes differ greatly, depending on whether the system treats intoxication as an issue that can affect fault, especially intent, or the capacity to be held blameworthy.

8.1. EFFECTS ON FAULT (MENS REA)

The different national approaches to intoxication have in common that they all consider it to be relevant whether or not the intoxication was voluntary. If the intoxication was involuntary, there are no objections against taking into account the impaired state of mind. Intoxication is involuntary when the intoxicant was slipped in the defendant's drink without his knowledge, when it was forced upon him or when the intoxicant was taken in good faith for medicinal purposes.

Secondly, all approaches to intoxication attach great weight to the extent of the intoxication. There is no problem as to fault when the defendant was tipsy, rather than drunk. Although the exact line between the two is difficult to draw, mens rea can only become a problem if the intoxication was powerful enough to actually negate the subjective element required by the offence, for example by completely removing awareness of what one is doing. Even if the defendant was less capable of resisting temptation, he still acted intentionally. After all, 'a drunken intent is still an intent.'[191] This threshold is set very high in the Netherlands, where in practice, proof of intent is simply inferred objectively from the (violent) act, the proof of which can only be rebutted if the defendant makes plausible he did not understand the nature of his actions and consequences at all.[192] Acquittals for lack of mens rea are therefore very rare. For example, in a case where the defendant took amphetamines and became psychotic, he thought his family was the devil and needed to be killed. This illusion does not preclude a court from finding that he wanted to kill the victims. He was mistaken on the identity of the victims, but not as to the fact that he was killing them.[193]

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[191] R v Sheehan and Moore [1975] 1 WLR 739.

In Germany, by contrast, there seems to be more room for intoxication to negate mens rea. Since intention presupposes knowledge, it is logical that a mistake should negate intention. No exception is made to this rule, even if a mistake is caused by voluntary intoxication. German courts are likely to accept or, more importantly in practice, to give the defendant the benefit of the doubt that he did not intend the result he brought about. For example, in a case where the intoxicated defendant became violent upon provocation and had killed the victim by hitting him several times on the head with a shovel, the Supreme Court upheld the mere conviction for negligent bodily harm occasioning death, pointing out that, amongst other things, the high level of alcohol in the defendant's blood might militate against finding intention:

German Supreme Court, 15 April 1997, NStZ-RR 1997, 233

> 'The District Court has not neglected that extremely dangerous violent acts allow for the conclusion that the defendant acted with the dolus eventualis to kill. It has even held that such a finding of intent is obvious in the face of the very dangerous violence in this case. Nevertheless does the establishment that certain behaviour was life-threatening not necessitate a finding of an intention to kill [...]. The trial judge has rightly included in its evaluation of the evidence circumstances, which can question a finding of dolus eventualis. The court has considered and evaluated the objective and subjective circumstances that are relevant to the question of an intent to kill. In the absence of evidence to the contrary, it has considered the fact as a spontaneous escalation of a dispute that began harmlessly, for which an understandable motive to kill was lacking. Similarly, it has taken into account the affective factors that followed from the evidence and the constitution of the defendant, which had been influenced by substantial consumption of alcohol. These are realities that can make the presence of a homicidal dolus eventualis questionable. It does not strain the requirements of the judicial belief formation when the chamber in the face of these circumstances could not be convinced of a homicidal dolus eventualis.'

All legal systems strike a compromise between a complete acquittal of the intoxicated perpetrator and not taking into account the intoxication. Simply put, this is done by making intoxication relevant to the mens rea of intention, but to limit or negate its effect on the mens rea of negligence or recklessness. As a result, the defendant will not be held liable for the most serious offence of, for example, intentional killing, but he will be liable for negligent killing. Even in the above-mentioned German case, the defendant was punished for a negligent offence.

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[192] HR 14 December 2004, NJ 2006, 448.

[193] HR 9 December 2008, NJ 2009, 157. If the defendant had thought he was killing monsters, this would not qualify under the offence of 'killing a person'. Similarly, there would not be intention if the accused had shot a hunter, believing he shot at a scarecrow.

In English law, if the intoxication crosses the threshold of severity and affects mens rea, the defendant is not held liable for the intentional offence. Nonetheless, he is held liable for a lesser offence that also requires mens rea, albeit in a more basic form, like recklessness. Moreover, where the defendant has voluntarily put himself in the position of being intoxicated to the extent that he is not capable of forming the fault element of the crime, the law is less understanding. A distinction is made between so-called crimes of basic intent and crimes of specific intent.[194] For example, voluntary intoxication can only negate the 'specific intent' required for murder, but the defendant will still be convicted of the 'basic intent' offence of manslaughter.[195] In *R v Lipman*, the defendant and his girlfriend took LSD. During his 'trip', the defendant hallucinated that he was descending to the centre of the earth and that snakes were attacking him. Believing he was fighting off these snakes, he actually killed his girlfriend by hitting her on the head and cramming eight inches of sheet down her throat. He was acquitted of murder because the jury doubted that he had the necessary intention, being intoxicated, but he was convicted of manslaughter.[196]

8.2. INTOXICATION AS AN EXCUSE

If the intoxicated defendant is considered to have acted intentionally or negligently, this leaves open the question of whether he should be excused for committing the offence. Under circumstances, the intoxication can lead to a lack of blameworthiness. Similar to a mental disorder, the intoxication can be so severe that the defendant is no longer capable of making morally responsible decisions. The use of intoxicants can lead to hallucinations that qualify the defendant as insane.

However, this possibility for the defendant to successfully raise such a defence is also significantly limited. Under the doctrine of prior fault, the defendant is precluded from relying on a defence which would have otherwise excused him. The reason for this is that if the defendant has created a situation, the danger that is typically to follow from it was foreseeable and should be attributed to him.

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[194] Crimes of specific intent have sometimes been defined as crimes where the offence can only be committed intentionally, i.e. where recklessness will not suffice, like murder. However, no explanation of the terms is entirely satisfactory and do not accurately cover the offences which have been categorised as either basic intent crimes or specific intent crimes.

[195] DPP v Beard [1920] AC 479; DPP v Majewski [1976] UKHL 2.

[196] R v Lipman [1970] 1 QB 152.

Clearly, the question of voluntariness of the intoxication plays an important role here.

In a Dutch case, a tourist had been indulging in the different narcotics available in Amsterdam, such as alcohol, cannabis and MDMA. In an unexpected hallucination of blind panic, he jumped out of the window of his apartment. Unfortunately, he landed on top of another tourist who was sitting on a terrace below the window. The victim became paraplegic and will never walk again. After rejecting the argument that the defendant was still aware of the risk of his actions, the court accepted that in any event, the defendant should have been able to recognise the danger of jumping out of the window, knowing of the terrace below it. He therefore fulfilled the offence of negligently inflicting serious bodily injury. Subsequently, it was assessed whether the defendant should be excused for committing this offence. The psychiatric experts advised the court to consider the defendant as insane. However, the court held that the defendant could not successfully rely on that defence because of prior fault.

Court of First Instance of Amsterdam, 9 June 2011, ECLI:NL:RBAMS:2011:BQ7589

> '[An] offence cannot only be attributed to the defendant if he would have known that by using cannabis he would lose control over his actions and subsequently, that the consequence – the commission of the present offence – was reasonably foreseeable. In order to attribute an offence, it suffices that the defendant can be blamed for his psychosis. [...]
>
> The defendant could therefore know that the use of cannabis and other drugs are not at all devoid of risks and that these substances could influence his functioning in such a way that risky behaviour could occur. This is particularly evident since the defendant took, in a short time, a space cake, a joint, a pill containing (what he assumed to be) MDMA and alcohol. It is generally known that psychological functioning after the use of such substances differs from person to person and that the combined use of different substances influences their effect in an unpredictable manner, thereby increasing the risks. This is not any different when the pill that the defendant swallowed did not contain MDMA as he assumed: in any event, he accepted the risks inherent in the combined use of substances. Neither does the circumstance that the sale of cannabis in the Netherlands is tolerated affect the foregoing. The court is of the opinion that under these circumstances the defendant should be held criminally responsible for his actions and their consequences, since, in view of the abovementioned considerations, the psychosis that occurred is attributable to himself. [...]
>
> The Court considers the imposition of a partially suspended sentence in place, in order to prevent the defendant from committing similar offences in the future. Moreover, the Court considers it important to generally clarify that dangerous behaviour, committed under the influence of narcotics, is punished with imprisonment. The court is of the opinion that all things considered imprisonment of 6 months, of which 3 months suspended, is appropriate and warranted.'

This approach of simply precluding the defence in the event of voluntary intoxication is unacceptable in Germany. The capacity to be blamed, to be morally held responsible, is laid down in the Criminal Code and requires that it must be present at the time of the commission of the offence.[197] This means that defendants who lacked the capacity to see the wrongfulness of their actions or to act in accordance with this appreciation are excused of their crime, however great the reproach is for the preceding intoxication. If high levels of alcohol are found in the blood of the defendant, it cannot always be excluded that the defendant lacked the aforementioned capacities. If there is any doubt, this is settled in favour of the defendant (*in dubio pro reo*).

However, the defendant is not always allowed to rely on the excuse, especially not in the most extreme cases of prior fault. If the defendant intentionally became intoxicated with a view to gaining courage or losing the aforementioned capacity to be responsible, liability will still follow, just like in other jurisdictions.[198] In addition, the final piece of the doctrine on intoxication is the special offence of §323a GCC ('*Rauschtat*'), which punishes defendants who intentionally or negligently get senselessly intoxicated and committed a wrongful act, for which he cannot be punished due to the excuse and/or lack of mens rea, with up to five years of imprisonment.[199] Intoxicated defendants therefore never just walk free.

9. CONCLUDING REMARKS

This chapter set out to discuss different defences that negate one of the two implied elements of an offence, i.e. wrongfulness and blameworthiness. Justifications are the mirror image of wrongfulness, whereas excuses negate blameworthiness. This dichotomy coincides with the second and third tier of the tripartite framework of criminal liability.

Whereas the dichotomy was introduced in Germany and the Netherlands about a century ago, in England it is still not widely accepted. Although England is increasingly moving towards the continental perspective, English law generally has not been very interested in the distinction between justification and excuse. First of all, the dichotomy of actus reus and mens rea is more influential in England. Justifications and excuses are often included into actus reus and mens rea respectively. The implied elements of wrongfulness and blameworthiness do not enjoy widespread recognition, whereas this is required to carve out a conceptual space for justifications and excuses. Secondly, many practitioners and scholars believe that the distinction has no practical legal consequences and is therefore irrelevant in a practice-based legal culture like the English one. However, as we have seen, the distinction does have practical legal consequences. First of all, by making a distinction between condemning the act and condemning the defendant, the dichotomy enables important communicative functions of the law. If that distinction is not made, there is a risk that excuses might be applied restrictively because of a fear that an excuse implies approval of the conduct. Further, the conditions of individual defences are influenced by the category to which they belong. Amongst others, the justificatory defences have stricter requirements of proportionality.

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[197] §20 GCC: '*Schuldunfähigkeit*'.

[198] 4 May 1962 BGHSt 17, 259.

[199] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 134; L. Berster, 'Vollraushtatbestand und unsicherer Rauschgrad' Zeitschrift für die gesamten Strafrechtswissenschaften (2012), pp. 991–1022.

We limited this chapter to a discussion of self-defence and necessity, the corresponding excuses of self-defence-excess and duress, and insanity. Looking at the scope of these defences, we may conclude that this is generally more restrictive in the English common law system than in Germany or the Netherlands. For instance, the excuse of self-defence-excess is unavailable in England, which is only partially counterbalanced by functional equivalents, like the defences of loss of control and diminished responsibility. Moreover, necessity, duress and insanity are much stricter in scope in English than in Dutch and German law. For instance, duress is not applicable to charges of murder, and the all-or-nothing insanity defence does not include volitional incapacities. These and other differences can be explained by the sceptical approach of English law to defences. First and foremost, fears persist that accepting some defences and extending others would weaken the authority of the norms and the legislator. It is feared that defences will be abused, hampering efficient prosecution of criminals. English law recognises that there are cases in which the defendant should not be punished severely or should not be punished at all, but prefers to enable this by procedural means, such as prosecutorial discretion, by sentencing or by pardoning the convicted person. Arguably, if the distinction between justification and excuse were better appreciated, some of these fears would be taken away. For instance, excusing the defendant because he acted out of duress, even in homicide cases, does not entail an approval of those actions. Instead, the excuse reinforces the norm by denoting that the defendant is only excused for his wrongful actions.

Finally we looked at the possible effect of intoxication on criminal liability. In England, the issue is treated predominantly in the context of the lack of mens rea. By contrast, in Germany, it is usually discussed as a problem of blameworthiness. Intoxication may exceptionally qualify as a disorder that can lead to an insanity defence. However, the availability of this defence is compensated for by the separate criminalisation of committing offences in a senselessly intoxicated state. In the Netherlands, defendants raise intoxication as a failure of proof defence and as an excuse, although without much success. This can be partly explained by the fact that Dutch courts more easily accept the prior fault doctrine in these cases.

CHAPTER IX

INCHOATE OFFENCES: ATTEMPT AND PREPARATION

Johannes Keiler and David Roef

1. INTRODUCTION

Traditionally, criminal liability is based upon a complete offence, i.e. the perpetrator has committed the actus reus with the necessary mens rea. At the core of criminal law, then, there lies a kind of harm (death, injury, destruction of property). Criminal law is therefore primarily backward looking and retributive by punishing wrongdoing that was already committed. Yet over time the focus of criminal law has widened and the common consensus nowadays is that criminal law is not only appropriate to respond to harm done, but also to reduce the risk of harm.[1] For this reason all legal systems accept inchoate offences, whose purpose is rather preventive than retributive.

The term inchoate generally means 'just begun, undeveloped, incipient'. Accordingly a central feature of these offences is that they are committed even though the substantive offence envisaged by the perpetrator was not completed and no actual harm emerged.[2] In this chapter we will discuss two main forms of inchoate liability: the (more traditional) doctrine of attempt and the (relatively new category of) preparatory offences.

Before we discuss the different questions raised by attempt and preparatory offences, we will first focus on a tension between different patterns of criminality which pervades a wide field of the criminal law but exerts significant influence on the scope and guise of inchoate offences. This tension arises between what Fletcher has termed the pattern of *manifest criminality* in contrast to the pattern of *subjective criminality*.[3]

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[1] D. Husak, 'Overcriminalization' (Oxford University 2008), p. 159.

[2] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), p. 454.

[3] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), pp. 115–234.

2. TWO PATTERNS OF CRIMINALITY: TWO WAYS OF LOOKING AT INCHOATE OFFENCES

In essence the dispute between the two patterns centres on the question: what is punishment imposed for? In the pattern of manifest criminality the main emphasis lies on the criminal conduct that occurred. The notion of intent only takes a subsidiary position in the analysis of criminal liability.[4] This corresponds to the requirements of act-based criminal law, which dictates that mere thoughts should not be punishable, as they occur in the private sphere of the citizens. The pattern of manifest criminality thus begins with liberty and insists that citizens in a liberal state ought not to be punished unless they commit a wrongdoing which constitutes an unreasonable risk of harm to others. Criminal liability, so the argument goes, ought to require an act that is objectively criminal. The focus thus rests on the harm or evil of the respective criminal offence. Applied to the notion of inchoate offences, this pattern would impose criminal liability only when the actor comes close to bringing about a tangible harm or evil.[5] The emphasis rests therefore on the wrongful conduct rather than on (the intentions of) the criminal actor.

In contrast, the pattern of subjective criminality departs from the assumption that the core of criminal conduct is the actor's intention to harm a legally protected interest (i.e. culpability).[6] Criminal law ought to protect specific legal interests, and people who intend to harm such interests are dangerous and therefore deserve punishment. The main reason that criminal law generally also requires some form of conduct for liability, so the proponents of this pattern state, is to assure the firmness of the actor's evil intention. Thus, in the pattern of subjective criminality, conduct only fulfils an evidentiary function, while in the pattern of manifest criminality it constitutes a substantive requirement.[7] This distinction becomes especially important in the realm of inchoate offences where the outward conduct often appears objectively innocuous. If the manifest criminality of the conduct is a substantive requirement of the pattern of criminal law, then no proof of intent can function as a substitute and make up for the missing manifest criminality. If conduct however only plays an evidentiary role, then the lack of a manifestly wrongful conduct may be remedied by the proof of a substitute criminal intent.[8] As the focus in this pattern primarily rests on the person rather than his (potentially) harmful conduct, it results in a broader scope of criminal liability. It is the actor's subjective culpability that is decisive.

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[4] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 117.

[5] P.H. Robinson and J.M. Darley, 'Objectivist versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory' Oxford Journal of Legal Studies (1998), p. 414.

[6] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), pp. 118–119.

[7] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 119; D. Roef and T. Prakken, 'Strafbare Voorbereiding in Nederland: Juridische Overkill', in Verbruggen, et al. (eds.), Voorbereidingshandelingen in het Strafrecht (van der Wolf 2004), pp. 231–244.

[8] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 119.

The two patterns of criminality are often entwined in contemporary thinking about criminal law. It would therefore be a fallacy to view those patterns as a strict dichotomy.[9] However, it is important to understand that in our modern society we no longer exclusively conceive of crime as harm or wrong that has to be remedied retrospectively by the imposition of punishment. Since the 1990s we have shifted from a traditional welfare state into a *culture of control* where the pursuit of security increasingly influences the application of criminal law and where crime is essentially seen as a form of risk. Accordingly, the focus of criminal justice systems has shifted towards the reduction of criminal opportunities in everyday life.[10] Polemically speaking, as criminal law is more and more invoked in tackling conduct far removed from concrete harm or danger, it seems as if the dystopia of Steven Spielberg's *Minority Report* has become the utopia of modern society. A paradigmatic expression of this shift in focus is the increasing criminalisation of preparatory conduct.[11]

3. PREPARATION

3.1. ATTEMPT VERSUS PREPARATION

Traditionally, almost all legal systems defined the threshold for criminal liability along the lines of the distinction between an attempt and mere preparation. Crudely stated, once a person had reached the attempt stage criminal liability would arise, while mere preparatory conduct would fall outside the scope of criminal law. Thus, to use an oversimplification, if vengeful John shoots at his enemy Bob but misses, he has come close enough to the violation of the protected legal interest to warrant the imposition of punishment; however, when John purchases the rifle his conduct is too far removed from the actual offence to warrant criminal censure. Criminal law therefore made a division between conduct that was quite close to the proscribed harm and constituted a clear danger while excluding conduct temporarily further removed. As already mentioned, this restrictive approach is increasingly discarded in the contemporary 'culture of control' for the sake of a policy of crime prevention. We will now discuss how this policy is reflected in different kinds of offences.

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[9] P.H. Robinson and J.M. Darley, 'Objectivist versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory' Oxford Journal of Legal Studies (1998), pp. 415–416.

[10] D. Garland, 'The Culture of Control – Crime and Social Order in Contemporary Society' (Oxford University Press 2006), pp. 103–139.

[11] J. McCulloch and S. Pickering, 'Pre-Crime and Counter-Terrorism' British Journal of Criminology (2009), p. 633.

3.2. OFFENCES CRIMINALISING SPECIFIC PREPARATORY CONDUCT

First, we can see that all penal systems have over time created a multitude of specific offences that criminalise different kinds of preparatory conduct. §149 GCC for instance prohibits the preparation of counterfeiting money, official stamps, etc. Thus, obtaining counterfeit machinery is explicitly criminalised in Germany.[12] The Dutch penal system also has similar offences, which are enshrined in Articles 214 and 234 DCC, and section 17(1) of the English 1981 Forgery and Counterfeiting Act prohibits the possession of instruments with the intent to use for forgery.

3.3. CONSPIRACY

A universally valid example can also be found in the notion of conspiracy which criminalises preparatory conduct by proscribing the formation of an agreement to commit a serious crime. The notion traditionally plays an important role in covering preparatory conduct in the English legal system, where it is generally interpreted broadly.[13] Conspiracy in England exists as a statutory as well as a common law offence. The former is enshrined in section 1(1) of the Criminal Law Act 1977 and essentially criminalises agreements between two or more people to commit a crime:

> 'Subject to the following provisions of this part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either:
> a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
> b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
> he is guilty of conspiracy to commit the offence or offences in question.'

What is required is that the parties involved agree on a course of conduct which if carried out necessarily amounts to or involves the commission of a criminal offence. The parties must intend that the agreement will be carried out and the crime committed by one or more of the conspirators.[14] If the parties later decide not to go through with the plan, since the actus reus is to reach an agreement they can still be charged. Probably the broadest and most controversial form of conspiracy is the conspiracy to defraud, which is committed as soon as an agreement to deprive another dishonestly of something can be proven.

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[12] See also: §§80, 83, 149, 202 (c), 234 (a), 275, 263 (a) GCC for offences criminalising preparatory conduct.

[13] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 484–526.

[14] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University 2013), pp. 474–476.

Conversely, in Germany and the Netherlands the scope of conspiracy was traditionally interpreted more narrowly, but has been rediscovered in the specific domain of the war against terrorism.[15] The large volume of anti-terrorism legislation that mushroomed in all Western countries after the 9/11 attacks contains a multitude of provisions that typically seek to criminalise preparatory conduct.[16]

3.4. THE SERIOUS CRIME ACT 2007

Reference should also be made here to the English Serious Crime Act 2007. This Act inter alia abolished the former common law and inchoate offence of incitement and substituted it with three inchoate offences which also significantly broadened the scope of participation rules. The impetus for the Act was a conceived gap and inconsistency in the law, namely that whereas criminal liability existed at an inchoate level for incitement (i.e. attempted instigation) liability could not arise in cases where assistance was offered but where the assisted offence was subsequently not committed. For example, if Max had told John to go and murder his treacherous wife, Max would have been liable for incitement regardless of whether John went on to commit the murder or not; whereas if Max handed John a gun he could not be prosecuted unless the murder was subsequently committed.[17] The Act is intended to step into this lacuna, but at the same time brings about a significant expansion of criminal liability. In summary, the Serious Crime Act 2007 introduces criminal liability where:

(a) a person does an act that is capable of encouraging or assisting the commission of an offence, intending to encourage its commission (section 44);
(b) a person does an act capable of encouraging or assisting the commission of an offence, believing that the offence will be committed and believing that his act will encourage or assist its commission (section 45);

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[15] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 415–416; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 303–319.

[16] See for instance: §89a DCC, penalising the preparation of serious violent offences endangering the state, §89b and §9 DCC. See further: Sections 5, 6 of the 2006 Terrorism Act, criminalising the preparation of terrorist acts and terrorist training, the 2001 Anti-Terrorism, Crime and Security Act and the 2005 Prevention of Terrorism Act as well as the 2004 Dutch law on terrorist offences.

[17] J.R. Spencer and G. Virgo, 'Encouraging and assisting crime: Legislate in haste, repent at leisure' Archbold News (2008), pp. 7–9.

(c) a person does an act capable of encouraging or assisting the commission of one or more of a number of offences, believing (i) that one or more of those offences will be committed (without having any belief as to which particular crime); and (ii) that his act will encourage or assist the commission of one or more of them (section 46).

Thus, by expanding criminal liability for participation in crime in several ways, a broad scheme of inchoate liability is introduced. This means that a person will be liable as soon as he has performed any act capable of assisting or encouraging the commission of an offence irrespective of whether it had any effect on the commission of the offence or whether the offence has been committed. Thus, where Alvin supplies a gun to Barney, believing that it will be used in a murder, liability will arise at the instant the gun is supplied, even if Barney never commits the offence. According to sections 45 and 46 it is sufficient if the defendant believes that the anticipated offence will be committed.[18]

3.5. PREPARATION AS A GENERAL DOCTRINE: THE DUTCH EXAMPLE

The concern for individual liberties and the general conviction that a mere culpability-centred criminal law should be avoided, prevented in most penal systems the creation of a general doctrine of preparation as a basis for criminal liability. As the weight of these arguments however diminished in contemporary society, some systems, notably in the Netherlands, have recently taken the step to introduce preparation as a general doctrine.

3.5.1. The history and rationale of Article 46 DCC

In 1991 the Dutch government introduced a proposal regarding the criminalisation of preparatory acts in Parliament. After a long and heated discussion the bill entered into force in 1994.[19] In its short history, the provision has already undergone several changes. Initially, preparation was for instance only punishable in regard to *joint preparatory efforts* of two or more perpetrators, as those were thought to constitute a bigger general threat to society.[20] Here we see still a focus on a more harm-centred conception of criminalising preparatory acts. However, in 2002 the legislator removed the requirement of joint preparation and thereby expanded the scope of liability to crimes prepared by individual perpetrators.[21] A further expansion of liability occurred in 2007 when the legislator removed the requirement that the preparatory means applied must be 'manifestly intended' for the commission of an offence. This removed an objective requirement from the provision and reinforced the focus on the suspect's subjective intentions reflecting therefore more a pattern of subjective criminality.

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[18] D. Ormerod and R. Fortson, 'Serious Crime Act 2007: The Part 2 Offences' Criminal Law Review (2009), pp. 400–402; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 529–530.

[19] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 404–405; C.M. Pelser, 'Preparations to commit a crime – The Dutch approach to inchoate offences' Utrecht Law Review (2008), p. 63.

After several amendments of the law, which gradually removed some objective safeguards, Article 46 DCC now reads as follows:

> '(1) Preparation to commit a serious offence which, by statutory definition, carries a term of imprisonment of not less than eight years, is punishable, where the perpetrator intentionally imports, transits, exports or has at its disposal, objects, substances, information carriers, concealed spaces or means of transport intended for the commission of the serious offence.
> (2) In case of preparation, the maximum principal penalty prescribed for the serious offence is reduced by one half.
> (3) In case of serious offences carrying a sentence of life imprisonment, a term of imprisonment of not more than fifteen years shall be imposed
> (4) The additional penalties for preparation are as for completed offences.
> (5) The term "objects" refers to all material and immaterial goods.'

One clear limitation of the scope of the offence can be found in the requirement that the preparatory acts must concern a crime that carries a term of imprisonment of not less than eight years. This limits the offence to the preparation of serious offences like arson, rape, deprivation of liberty, murder and manslaughter, extortion, etc. Let us now have a closer look at the constituent elements of this inchoate offence

3.5.2. *The actus reus of preparatory acts*

In regard to criminal preparation it is also required that the intention to commit the offence has manifested itself in the preparatory acts. The law outlines (i) several preparatory means and acts which were (ii) intended to circumscribe the scope of the offence. Thus, the offence contains two objective criteria.

First, the perpetrator must (i) obtain, import, transit, export or have at his disposal (ii) objects, substances, information carriers, concealed spaces or means of transport. These terms are interpreted broadly. Thus, a multitude of every day objects can fall under preparatory means. A stone, a rope, a pin, or a kitchen knife could all constitute preparatory means, provided the required intention can be proven.[22] The Supreme Court has for instance considered fertilizer, electric circuits and chemicals as substances.[23]

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[20] G.A.M. Strijards, 'Strafbare voorbereidingshandelingen' (W.E.J. Tjeenk Willink Zwolle 1995), pp. 42 et seq.

[21] D.H. de Jong and G. Knigge, 'Het materiële strafrecht' (Kluwer 2003), p. 208.

The second objective element can be found in the requirement that the preparatory means must be intended for the commission of a serious offence. How can it for instance be established that a mobile phone, a car or a rope is intended for the commission of an offence. Before 2007 the law required that the means were 'manifestly intended' for the commission of the offence, but in 2007 the word manifestly was removed. This of course raises the question of whether this change introduced a far-reaching shift towards culpability-centred criminal liability.[24] Although the legislator seemingly aimed at introducing a subjective approach with Article 46, jurisprudence seems to have adopted in most cases a moderate objectivist approach. Intentions alone are still considered insufficient to ground criminal liability in these cases. The offender's intentions must have objectively manifested themselves in an overt act.

An important decision with regard to criminal preparatory acts is the so-called *Samir A.* decision. Although the judgment concerned the old version of Article 46 where 'manifestly' was still an objective element of the offence, the Supreme Court ruled that in determining the criminal purpose of preparatory means by their outward manifestation one cannot abstract from the criminal goal which the defendant aims to reach by using these means. With this judgment the Supreme Court anticipated and also paved the way for the subsequent removal of the word 'manifestly' from the offence definition. It is interesting to give some attention to the facts in this famous case.

In the course of an investigation concerning the robbery of a supermarket, a house search was carried out in the flat of a 17-year-old Dutch teenager, Samir A. who was suspected of being an accessory to the robbery. During the search the police found a cartridge clip, a silencer, an imitation firearm, a bulletproof vest, night-vision goggles, several handmade floor plans of public buildings like the Lower House of Parliament, a nuclear power plant and the Amsterdam airport, including notes on security measures and potential escape routes, as well as chemical and electronic equipment which was intended to manufacture a bomb.

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[22] G.A.M. Strijards, 'Strafbare voorbereidingshandelingen' (W.E.J. Tjeenk Willink Zwolle 1995), p. 125.

[23] HR 20 February 2007, ECLI:NL:PHR:2007:AZ0213.

[24] K. Rozemond, 'De Subjectivering van het Nederlands Strafrecht' Nederlands Juristenblad (2007), pp. 2301–2305.

As the 2004 Terrorist Offences Act was not yet in force, Samir A. was charged with the criminal preparation of murder, arson and causing an explosion.[25] One characterising feature of this case was the amateurish nature of the preparatory acts, as well as the very early stage in which the criminal endeavour was discovered. Experts had concluded that the objects discovered (a plastic bottle with electric fibre made from Christmas tree lights and filled with chemicals) were not at all suited for causing an explosion, inter alia because the fertilizer used to construct the device lacked the necessary ammonium nitrate. In addition, the blueprints and plans discovered showed the amateurish nature of the enterprise, as most information was simply gathered from the Internet. The Court of First Instance had acquitted the defendant of preparing a terrorist attack but still convicted him of the illegal possession of arms and ammunition. The Court argued that the defendant lacked the necessary mens rea and that the primitive nature of the seized objects made it factually impossible for the crime to be committed.[26]

The Court of Appeal subsequently upheld the acquittal but applied a different reasoning. It held that despite the defendant's (terrorist) intention it was not only a question whether the means could contribute to the commission of the offence in the abstract, but also whether manufacturing materials or having materials at his disposal amounts to a concrete or actual danger. The Court ruled that the amateurish and primitive means did not amount to an actual threat, nor could they do so in the near future.[27] The Supreme Court however quashed the acquittal, and by referring to the legislative history of the provision held that what is important is whether the objects seized, separately or together, by their outward manifestation can be suitable for the criminal purpose the defendant has in using them.

Dutch Supreme Court, 20 February 2007, ECLI:NL:HR:2007:AZ0213

'3.5. Art. 46, first paragraph, (old) CC reads as follows:

"Preparation to commit a serious offence which, by statutory definition, carries a term of imprisonment of not less than eight years, is punishable, where the perpetrator intentionally imports, transits, exports or has at its disposal, objects, substances, information carriers, concealed spaces or means of transport manifestly intended for the commission of the serious offence."

3.6. In the legislative history related to this provision [the Minister of Justice says the following]:

"Under 'objects' has to be understood independent items that are, whether considered separate or together, manifestly useful for a criminal purpose. It is not necessary that they already have a recognizable instrumental character from the moment the state intervenes." (Parliamentary Papers II 1990–1991, 22 268, no. 3, p. 16)

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[25] C.M. Pelser, 'Preparations to commit a crime – The Dutch approach to inchoate offences' Utrecht Law Review (2008), p. 66.

[26] Rb. Rotterdam 6 April 2005, ECLI:NL:RBROT:2005:AT3315.

[27] Hof Den Haag 20 November 2005, ECLI:NL:GHSGR:2005:AU6181.

"The means employed must be clearly intended for a criminal purpose. The criminal intent must, in the circumstances in which the means were used and found, catch the eye of the average person. For preparatory acts the unlawful character of the prohibited conduct is of course derived from the perceived final purpose and not, as in the completed offence, from the result. This means that causality, which plays such an important role in the attempt and the completed offence, is quite irrelevant here and that its function is substituted by the finality of the act." (Parliamentary Papers II 1990–1991, 22 268, no. 3, p. 18)

"To establish criminal liability, Dutch criminal law hardly ever requires the investigation of motives, emotions and final objectives of perpetrators. However, this is different for the inchoate offence, because what is lacking in objective elements for the legal grounding of a criminal response, is more or less compensated by the subjective elements, to which is given therefore more weight. The offence elements are operating here, so to speak, as 'communicating vessels'." (Parliamentary Papers II 1991–1992, 22 268, no. 5, p. 19)

"For the criminalization of a preparatory act it definitely plays a role that persons have noticed from the offender's behaviour that he is very well capable to commit a serious crime and that he has even made some preparations. [...] The fact that nothing will be done against someone who has shown such a disposition, is difficult to understand and increases feelings of insecurity. I would certainly not consider it right that the sole criterion for criminalization should be: concrete harm of a specific person or disadvantage of the public interest." (Parliamentary Papers II 1991–1992, 22 268, no. 5, p. 24)

"Amongst others, that's why I have given in the preceding discussion more attention to the doctrine of 'criminal attempt' of Article 45 of the Criminal Code. While the phrase 'beginning of completion' should be reconstructed independently of the underlying intent of the perpetrator – that's what the objectivist jurisprudence boils down to – this will not be the case for the 'preparatory act'. Here the act has to be considered as a symptom of the underlying criminal orientation of the will. The act must betoken the firmness of the intention to commit a criminal offence". (Parliamentary Papers II 1992–1993, 22 268, no. 7, p. 14)

3.7. In answering the question whether the objects, substances, information carriers, concealed spaces or means of transport (hereinafter referred to collectively as "objects"), listed in Article 46 CC, are separately or together, by their outward appearance "manifestly intended" to commit the offence within the meaning of that provision, can, following from the above legal history, not be abstracted from the criminal purpose the suspect has in mind in using them.

The Court, having considered that there is no doubt regarding the terrorist intent of the accused, has held that the objects, substances and information carriers listed in the indictment and which the defendant had made or had available, are not manifestly intended to prepare an attack such as he is charged with, because these objects can not reasonably have that intention in an objective sense. The Court thus apparently held as a criterion whether these objects by their nature or by their concrete or acute endangerment could actually contribute to the commission of that

> offence. Thus, the Court had demonstrated a too narrow and therefore erroneous understanding of Article 46, first paragraph, (old) CC. The Court had failed to assess whether at the time of the action the objects seized, separate or together, by their outward manifestation, can be suitable for the criminal purpose that defendant has in using them.'

Thus, the evaluation need not be based on preparatory acts that provide a real possibility that the crime is committed, but a hypothetical possibility that the offender might reach that point seems now sufficient. It should however be kept in mind that the *Samir A.* saga constitutes an exceptional case, for it concerns the very serious endeavour of committing a large-scale terrorist attack.[28]

3.5.3. The mens rea of preparatory acts

Article 46 DCC explicitly refers to an intention to prepare a criminal offence. This would on first sight also include the broad notion of dolus eventualis to establish liability for a preparatory offence. Placed in the broader context of the offence, however, it seems that the word intention needs to be construed more restrictively in the realm of preparatory acts. This is understandable if one considers the prominent role that intentions play here and that the objective conduct discernible is often innocuous and ambiguous. The less instructive the conduct that occurred, the more weight one should place on the fault requirement. In almost every household you will find objects, like for instance a car, chemicals, etc., which could be regarded as means for preparing a criminal offence. But only if a criminal purpose can be proven independent of these means is the fault requirement of the offence fulfilled.[29] The intention of the perpetrator needs to furthermore be directed towards the commission of a particular crime. This is because preparatory acts are only punishable in relation to some serious offences.

4. ATTEMPT

4.1. INTRODUCTION

Once the actor has passed the preparatory stage, the law on criminal attempts comes into play. The very essence of an attempt is that the defendant has for whatever reason failed to commit the full offence, for example if a burglar is apprehended by the neighbourhood watch before he can break into a house, or Marc, who wants to shoot his uncle Barnaby to inherit his fortune, pulls the trigger but misses. As discussed below, in the law of attempt the tensions between the pattern of manifest and subjective criminality play a role on different levels. First, it influences the doctrine on a fundamental level in regard to the rationale for punishing attempts (section 4.2). Second, it influences the creation of proper criteria for determining the actus reus of attempt liability (section 4.4). Third, the different views may lead to different results with regard to impossible attempts, i.e. attempts which by their very nature cannot come to fruition (section 4.6). Finally, the distinction is of relevance at the level of punishment, in relation to the question of just how much punishment attempts should warrant.

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[28] The case was subsequently returned to the Amsterdam Court of Appeal (17 September 2007, ECLI:NL:GHAMS:2007:BB3756) which imposed a sentence of four years imprisonment. It ruled that all the belongings of the defendant together and in that connection had a preparatory and criminal nature.

[29] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 414.

4.2. DIFFERENT RATIONALES FOR PUNISHING ATTEMPTS

Corresponding to the patterns of manifest and subjective criminality, one may distinguish objective and subjective rationales for punishing attempts. Objective theories focus on the dangerousness or wrongfulness of conduct.[30] They can take a variety of forms but most require a concrete endangerment of the underlying protected legal interest.[31] Objectivist theories generally stress the importance of legal certainty and protecting individual liberties and therefore tend to draw the line of liability as close as possible to the consummation of the offence. An example of such an approach can arguably be found in the classical phrase that the offender must have commenced with the execution of the criminal offence in order to incur liability.[32]

Subjective rationales on the other hand focus on the dangerousness or culpability of the actor.[33] They see the reason for punishing attempts in the criminal disposition of the actor, the exercise of his criminal intentions or his hostile attitude towards the law.[34] Subjective rationales also generally stress the importance of crime prevention. The conduct that actually occurred is only relevant as far as it verifies the firmness of the intent. In other words, subjectivist rationales do not require any form of objective wrongdoing. The conduct requirement, according to these theories, merely fulfils an evidentiary function. The corollary of this approach is that subjectivists generally claim that the punishment imposed for attempts should be just as severe as for the completed offence.[35]

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[30] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 340–342.

[31] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem. §22 Mn 18.

[32] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 139.

[33] A. Duff, 'Criminal Attempts' (Clarendon Press 1996), pp. 147–192.

[34] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 342 et seq.

Due to the fact that both pure objective and subjective rationales have clear shortcomings, an intermediate rationale seems to be preferable to justify the punishment of attempts. These mixed rationales emphasise the *social dimension* of the conduct in question. Mixed rationales straddle the objective/subjective dichotomy by not only invoking the actor's criminal intentions or proclivities to justify punishing attempts, but in some variations also the (objective) impression that the occurred conduct makes on society as a whole, without requiring any concrete endangerment. Such a mixed rationale has become the prevalent view in Germany and the Netherlands.[36] However, the two systems assign different weight and significance to the objective and the subjective limb of the theory. In Germany, subjective factors such as the actor's intentions carry more weight while in the Netherlands the focus lies primarily on objective factors such as endangerment. In England the prevalent view seems to put the main emphasis on subjective factors.[37]

4.3. AN OVERVIEW OF THE LEGAL PROVISIONS ON ATTEMPT

We can now turn to the legislative foundations for punishing attempts in Germany, the Netherlands and England. The following overview will set the scene for our subsequent discourse on the general requirements for attempt liability.

4.3.1. Germany

§22 GCC contains a definition of attempt. It provides:

> 'A person attempts to commit an offence if he takes steps which will immediately lead to the completion of the offence envisaged by him.'

§23 GCC subsequently deals with liability for attempts in general. It holds:

> '(1) Any attempt to commit a felony entails criminal liability; this applies to attempted misdemeanours only if expressly so provided by law.
> (2) An attempt may be punished more leniently than the completed offence (section 49 (1)).

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[35] R.A. Duff, 'Criminal Attempts' (Clarendon Press 1996), pp. 151 et seq.

[36] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 388; A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), Vorbem. §22 Mn 22.

[37] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 455–457.

> (3) If the offender due to gross ignorance fails to realize that the attempt could under no circumstances have led to the completion of the offence due to the nature of its object or the means by which it was to be committed, the court may order a discharge, or mitigate the sentence as it sees fit (section 49 (2)).'

From §22 GCC we can deduce that the legislator adopted a mixed rationale in order to justify the punishment of attempts. The objective limb can be found in the requirement that the actor needs to take steps which will immediately lead to the completion of the offence. Thus, there must be a certain imminence about the actor's conduct leading to the commission of the offence. The subjective criterion is reflected in the fact this has to be established according to how the person envisaged the commission of the offence.[38]

Further hints demonstrating that a mixture of objectivist and subjectivist considerations guide German law can be found in the fact that attempts *may* be punished more leniently according to §23 (2). Objective reasoning would press here for a mandatory mitigation of punishment due to the absence of harm, while subjectivists would punish attempts as severely as completed crimes as the culpability of the actor appears equivalent to that of the successful perpetrator.

4.3.2. The Netherlands

In the Dutch penal system an attempt is defined by Article 45 DCC. It reads as follows:

> '(1) An attempt to commit a serious offence is punishable where the perpetrator manifests his intention by initiating the serious offence.
> (2) In case of attempt, the maximal principal penalty prescribed is reduced by one third.
> (3) In cases of a serious offence carrying a sentence of life imprisonment a term of imprisonment of not more than twenty years shall be imposed.
> (4) The additional penalties for attempt are as for the completed serious offence.'

Similar to the German provision, a mixed approach can be distilled from Article 45 DCC. The objective limb can be seen here in the requirement that the perpetrator must have initiated the offence, while the subjective component is contained in the requirement that the occurred conduct must manifest the would-be perpetrator's intention. A clear indication of a more objective proclivity in the Dutch penal system can be found in Article 45(3) DCC which foresees a mandatory reduction of the maximum penalty which can only be explained by an objectivist conception of attempts.

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[38] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §22 Mn 1.

4.3.3. England and Wales

In England the law of attempt is since 1981 regulated in the Criminal Attempts Act. Section 1(1) provides:

> 'If with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.'

This phrase does however not provide us with much insight into the rationale underlying the English law of attempt. It contains a formula by which a line between attempt and preparation has to be drawn. The enshrined mens rea element is intention, which in literature and jurisprudence is often termed the principal ingredient of the crime.[39] This already hints at a subjective conception of attempts. The subjective rationale is however more clearly revealed by section 1(2) of the Criminal Attempts Act 1981 which provides:

> 'A person may be guilty of attempting to commit an offence to which this section applies even though the facts are as such that the commission of the offence is impossible.'

Thus, the provision makes it clear that the actor's criminal proclivities or subjective conception of the deed is what constitutes the central focus of the law of attempts.

4.4. THE ACTUS REUS OF ATTEMPT: DRAWING THE LINE BETWEEN ATTEMPT AND PREPARATION

The central question as regards the conduct requirement of attempts essentially is how close to the consummation of the criminal offence an actor must have come in order to speak of a criminal attempt. As mere intentions are not punishable, a threshold needs to be established in order to demarcate attempts from conduct falling short of an attempt (i.e. preparation).

4.4.1. The German approach

§22 GCC requires steps which immediately lead to the completion of the offence, which is the equivalent to 'more than merely preparatory' in English law and 'initiation of the commission of the offence' under Dutch law. The German courts frequently combine objective and subjective criteria in a test that assumes that attempt liability will arise once the perpetrator has subjectively passed the 'here we go' (*jezt geht's los*) threshold and objectively commenced his attack on the legal interest, protected by the underlying offence, so that his conduct will without further steps lead to the commission of the actus reus.[40]

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[39] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 457 et seq.; R.A. Duff, 'Criminal Attempts' (Clarendon Press 1996), p. 5.

The focus on essential steps, necessarily connected to the commission of the actus reus, however, makes the distinction between attempts and preparation a highly casuistic one, which is also strongly influenced by the offence in question. To demonstrate the functioning of the test in practice, consider the following case. The defendants had agreed to rob the owner of a petrol station. They drove to his house and rang the doorbell, gun in hand and wearing ski masks. However, the door remained closed and, after a neighbour had spotted them, they abandoned the attempt. The Supreme Court, applying the aforementioned formula, convicted the defendants of attempted robbery, as they had subjectively transgressed the 'here we go' threshold and had objectively commenced the attack on the legal interest as their conduct would without further steps have led to the commission of the actus reus (threatening the person who opened the door with the gun).[41]

The importance of the subjective sphere of the perpetrator in the German law on attempts is however further substantiated by the fact that the question whether or not one can already speak of an endangerment of the protected legal interest is to be determined according to the conception of the perpetrator. Thus, if the perpetrator believes that the victim will come into contact with the trap in the foreseeable future, attempt liability will arise. For this reason the Supreme Court for instance convicted several perpetrators of attempted murder, as by night they had attached hand grenades to the cars of the victims which were meant to be detonated by wires connected to the wheels of the car. In one instance the bomb was detected by the victim before entering the car and in another the trigger mechanism malfunctioned and the grenade did not detonate. The Supreme Court held that the perpetrators knew that the victims would use their cars in the foreseeable future and that they had even come within the sphere of action of the trap.[42]

What these examples demonstrate is that in Germany the temporal element combined with the question whether the perpetrator according to his point of view still has to take further essential steps or even a further decision before embarking on a certain course of conduct plays a crucial role in determining the outer limits of attempt liability.[43]

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[40] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 370; A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §22 Mn 36–45.

[41] 16 September 1975 BGH NJW 1976, 58. See also: 13 August 1996 BGH NStZ 1997, 83; 11 June 2003 BGH NStZ 2004, 38; 9 August 2011 BGH NStZ 2012, 85.

[42] 7 October 1997 BGH NStZ 1998, 294.

[43] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 143.

4.4.2. *The Dutch approach*

In a landmark decision very similar to the aforementioned German decision concerning the attempted robbery of the owner of a petrol station, the Dutch Supreme Court established a test to distinguish an attempt from mere preparation which is regularly applied until the time being. Two masked men, carrying weapons and a big bag, had rung the doorbell of an employment agency. However, the door was subsequently not opened but the men were arrested by the police, who had been notified. The Supreme Court upheld the conviction for attempted robbery and held that the acts of the two men could be seen as the initiation of the commission of the offence as these acts can be considered in their outward manifestation to be aimed at the completion of the offence.[44] Thus, the test to distinguish attempts from preparatory acts is whether to its outward manifestation the offender's behaviour can be considered to be aimed at the completion of the offence. Accordingly, the Dutch Supreme Court seems to place special emphasis on the objective impression or meaning of the occurred conduct, a stance which arguably largely corresponds to a pattern of objective criminality.[45] However, this does not mean that the would-be perpetrator in the Netherlands must have already brought about part of the actus reus or must have committed the last act. On the contrary, just like in Germany and England conduct taking place before the 'last act' can also amount to a criminal attempt, if it is necessarily connected to the commission of the actus reus.

The above test was further developed in a case regarding the attempted robbery of an exchange office. Two men were sitting in a stolen car with forged licence plates in front of an exchange office. They were wearing wigs, and the engine of the car was running. They were waiting for the teller to open the exchange office, but when he arrived he recognised the car, grew suspicious and informed the police, who arrested the men. The Supreme Court held that no attempt liability could be established, as the suspects had not initiated the commission of the robbery, as they had not yet left the car nor acted in a way which according to its outward manifestation could be considered to be aimed at the completion of the offence. The court reached this conclusion despite the fact that the police found weapons, handcuffs, rope and tape in the suspects' car. The court seemingly put the emphasis in this case on the objective elements of criminal attempts. The outward manifestation of the offender's behaviour must be aimed at the completion of the offence. The social connotation of the conduct is the determining factor here.[46] The fact that the car was stolen, had forged licence plates and that the occupants of the vehicle were armed, etc. was not discernible for an observer and therefore not part of the outward manifestation of the behaviour.[47]

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[44] HR 24 October 1978, NJ 1979, 52.

[45] G.P.M.F. Mols and J. Wöretshofer, 'Poging en voorbereidingshandelingen' (Ars Aequi Libri 1994), pp. 26–36.

[46] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 390.

4.4.3. The English approach

In England, the leading decision on what constitutes acts which are 'more than merely preparatory' is *R v Gullefer* where it was ruled that the defendant had to have 'embarked on the crime proper'.

> **R v Gullefer (1990) 3 All ER 882**
>
> "The facts were as follows. On 5 March 1985 the appellant attended the greyhound racing stadium at Romford. During the last race, as the dogs rounded the final bend, he climbed the fence onto the track in front of the dogs, waving his arms and attempting to distract them. His efforts were only marginally successful, and the stewards decided that it was unnecessary to declare "no race". Had they made such a declaration, by the rules the bookmakers would have been obliged to repay the amount of his stake to any punter, but would not have been liable to pay any winnings to those punters who would have been successful if the race had been valid.
>
> When interviewed by the police the appellant said the reasons for his behaviour were partly that a year earlier he had lost a large bet at the stadium by reason of one of the stadium's staff leaning over the rails and distracting the dog on which he had gambled. He also admitted that he had attempted to stop the race because the dog on which he had staked £18 was losing. He hoped that by his actions the dogs would be distracted, that the stewards would declare "no race" and that he would therefore recover his stake from the bookmaker.
>
> [...]
>
> The main burden of counsel's submission to us has been the third ground of appeal, namely that the acts proved to have been carried out by the appellant were not "sufficiently proximate to the completed offence of theft to be capable of comprising an attempt to commit theft".
>
> We have been referred to a number of decisions, many of them of respectable antiquity, which show, if nothing else, the difficulties which abound in this branch of the criminal law. The present law is, however, now enshrined in the words of the Criminal Attempts Act 1981. Section 1(1) provides: "If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."
>
> Section 4(3) provides: "Where, in proceedings against a person for an offence under section 1 above, there is evidence sufficient in law to support a finding that he did an act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact."

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[47] K. Rozemond, 'De algemene strafbaarstelling van voorbereidingshandelingen in het licht van de pogingsjurisprudentie van de Hoge Raad' Delikt en Delinkwent (1994), p. 660.

> […]
>
> The first task of the court is to apply the words of the 1981 Act to the facts of the case. Was the appellant still in the stage of preparation to commit the substantive offence, or was there a basis of fact which would entitle the jury to say that he had embarked on the theft itself? Might it properly be said that when he jumped on to the track he was trying to steal £18 from the bookmaker? Our view is that it could not properly be said that at that stage he was in the process of committing theft. What he was doing was jumping onto the track in an effort to distract the dogs, which in its turn, he hoped, would have the effect of forcing the stewards to declare "no race", which would in its turn give him the opportunity to go back to the bookmaker and demand the £18 he had staked. In our view there was insufficient evidence for it to be said that he had, when he jumped onto the track, gone beyond mere preparation.
>
> […]
>
> The appeal against conviction is allowed and the conviction quashed.'

In short, the Court held that his act was merely preparatory, as he had not yet approached the bookmaker to claim back his stake. Attempt only begins when the merely preparatory acts come to an end and the defendant embarks on the crime proper. This test was also applied in the more recent case of *R v Dagnall*.[48] In this case the defendant was convicted of attempted rape. He had met the victim at a bus stop at night and a conversation followed, in which it became apparent that he wished to have sexual intercourse with her. As the victim attempted to move away from the bus stop the defendant followed her, grabbed her by the hair from behind, pulled her forcibly towards him and finally forced her against a fence. Fortunately at this point the police arrived at the scene and arrested the defendant. The court concluded that the acts taken by the defendant had brought him beyond the merely preparatory stage. 'He had virtually succeeded in achieving all that he needed. He had overcome her resistance and it was only […] the arrival of the police car that prevented the ultimate offence from taking place'.[49]

Unfortunately, however, English courts have failed to adopt a consistent approach and fluctuate between a mixed approach with more weight on objective factors and a subjective approach.[50] More restrictive, viz. objective, are decisions such as *R v Geddes*,[51] where the defendant was found in a boys' lavatory block at a school in Brighton. He was carrying a rucksack, containing a large kitchen knife, some lengths of rope and a roll of masking tape, thus all articles that pointed towards an attempt of false imprisonment. His conviction, however, was quashed and it was held that his acts were merely preparatory, as he did not have any contact or communication with any pupil, and had never confronted any pupil in the school.

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[48] R v Dagnall [2003] EWCA Crim 2441.

[49] See: A.T.H. Smith, 'Proximity in attempt: Lord Lane's "midway course"' Criminal Law Review (1991), pp. 576–582.

[50] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 454 et seq. See also: M. Brockhaus, 'Die strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im europäischen Vergleich' (Verlag Dr. Kovac 2006), pp. 327–330.

[51] R v Geddes [1996] Crim LR 894.

More subjective tendencies, on the other hand, can be found in *R v Griffin* dealing with attempted child abduction.[52] The defendant in this case wanted to take her children out of England without the permission of the local authority in whose care they were. She had bought ferry tickets to Ireland and then tried to take the children out of school, saying that they were to go to the dentist. The teacher however refused to let the children leave. The defendant was convicted of attempted child abduction and the Court of Appeal upheld her conviction arguing that it was immaterial that the children had not been given into her custody and that she had not embarked on the journey. In asking the school whether she could take the children, she had manifested her intentions which amounted to an act of attempted abduction.

One possible explanation for the fluctuating approach of English law in regard to criminal attempts can arguably be found in the fact that the determination of when conduct can be considered to be 'more than merely preparatory' is in the English penal system seen as a question of fact, to be decided by the jury.[53]

4.5. THE MENS REA OF ATTEMPT

As the desired result is per definition absent in criminal attempts, we are often left with only the perpetrator's intentions to determine what he actually set out to achieve and how. Here we are confronted with the different approaches as to mens rea standards adopted in the English common law tradition and in the civil law countries of Germany and the Netherlands.

4.5.1. The fault element in the Netherlands and Germany

The mens rea requirement is not that problematic in Dutch and German jurisprudence on criminal attempts. It is generally accepted in both systems that the lowest form of intention, i.e. dolus eventualis, is sufficient to trigger attempt liability.[54] The Dutch Supreme Court has accepted dolus eventualis as a sufficient mens rea standard for attempt liability in the case of a car driver who attempted to ride over a police officer. The police officer at the last moment jumped out of harm's way, and the driver was convicted of attempted manslaughter, as in the court's opinion he had accepted the considerable chance that the police officer could be killed by his actions.[55]

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[52] R v Griffin [1993] Crim LR 515.

[53] Scholars have denounced this state of affairs which might lead to inconsistencies and propose that the question should be one of law left to the judge. See: 'Conspiracy and attempt, Consultation Paper' LAW COM No 183 [2007], p. 20; C.M.V. Clarkson, 'Attempt: The Conduct Requirement' Oxford Journal of Legal Studies (2009), p. 41.

[54] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 387.

As discussed in Chapter VII, dolus eventualis requires both a volitional and a cognitive component. For attempt this means that the perpetrator envisaged circumstances which in case of manifestation would amount to the commission of the actus reus of the aspired offence. This includes any aggravating subjective requirements. Thus, in order to be liable for aggravated murder pursuant to §211 GCC, the perpetrator must have the intention to kill and have acted out of one of the subjective criteria mentioned therein, for instance bloodlust. If this is not the case, only liability for attempted manslaughter pursuant to §212 GCC can arise.[56]

4.5.2. *The English fault element*

The fault element for attempt as outlined by section 1(1) of the 1981 Act requires 'intent' to commit the substantive offence. As a general rule one can only be liable for an attempt if one acts with the intention of committing the complete offence. This means that even if the full offence can be committed recklessly, there will be no liability for attempt unless intent is established.[57] For example, for most non-fatal offences against the person (assault, battery) recklessness is sufficient, but it is not enough to convict someone for attempting these offences. However, in practice things may become more complicated depending on whether the actus reus of the offence not only defines conduct, but also requires the bringing about of certain consequences, or includes specific circumstances.

First, the doctrine of attempt will require proof of an intention regarding the consequence of the substantive offence.[58] Let us illustrate this with the offence of murder, a classical example of a crime requiring the occurrence of a consequence (i.e. the death of a human being). Whilst an intention to cause grievous bodily harm is sufficient to warrant a conviction for murder, attempted murder still requires an intention to kill, although the courts have also accepted indirect intent.[59] In a pertinent case the defendants were involved in a fight with the victim. They threatened to kill him and finally dropped him from a third floor balcony. He survived the fall, though was severely injured. They were convicted of attempted murder and the Court of Appeal upheld the conviction, holding that the jury was entitled to draw the inference that they were intending or trying to kill the victim given that they foresaw that the victim's death was a virtually certain outcome of their conduct.[60]

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[55] HR 6 February 1951, NJ 1951, 475. See also: Chapter VII, section 2.3.2.

[56] M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), p. 140.

[57] C. Elliot and F. Quin, 'Criminal Law' (Pearson Education Limited 2010), p. 257.

[58] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 459–460.

[59] R v Wollin [1998] 4 All ER 103.

[60] R v Walker [1990] 90 Cr App R 226.

Second, where the substantive offence requires intention or knowledge as to circumstances, it is obvious that the same will apply for attempts. The picture gets more blurry, however, if the substantive offence requires less than intention or knowledge. Although an attempt requires an intended result, it is clear that an intention as to circumstances is not required, as long as the substantive offence does not require intent in this regard.[61] A case in point here is the offence of rape. In *R v Khan* the Court of Appeal, after carefully considering the conflicting opinions, came to the conclusion that 'a man may commit the offence of attempted rape, even though he is reckless whether the woman consents to sexual intercourse since the attempt relates to the physical activity and his mental state of recklessness relates, as in the offence of rape itself, not to that activity but to the absence of the woman's consent and therefore no question of attempting to achieve a reckless state of mind arises in such circumstance'.[62] This conclusion seems right in principle, as it is hardly conceivable to recklessly have sexual intercourse. Furthermore, a ruling to the contrary might have severely curtailed the protection offered to citizens by the law of attempts, as it seems a very daunting challenge for the prosecution to prove that the defendant intended that the woman with whom he had sexual intercourse did not consent.[63]

4.6. IMPOSSIBLE ATTEMPTS

If it is impossible to commit a crime, it is obvious that no one can be convicted for committing it. This does not however mean that one cannot attempt to commit this crime. This happens when the defendant does not realise that what he attempts is impossible, that he is making a mistake, as when he tries to kill a person who is already dead. There are a multitude of textbook examples which illuminate the picture. Suppose for instance that Brian wants to kill his uncle and therefore pours a white powder which he beliefs to be arsenic into his tea. Contrary to his belief, however, the white powder is not arsenic but harmless sugar. Thus, an impossible attempt can be defined as an attempt that could under no circumstances have led to the envisaged result. An attempt may be considered impossible due to the inaptness of the object or means for the commission of the offence.

One can distinguish two further categories of impossibility. On the one hand are what might be termed imaginary offences or legal impossibilities. The offender in these scenarios believes that what he is doing is a criminal offence when in reality it is not. Thus, if Amil believes that adultery constitutes a criminal offence in Europe and nevertheless cheats on his wife, can it then be said that he is attempting the 'crime' of adultery? On the other hand are superstitious attempts where the impossibility stems from the fact that the actor is attempting to achieve his goal by applying superstitious means such as curses or invoking demons.

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[61] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 465.

[62] R v Khan and others [1990] 2 All ER 783.

[63] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 466–467.

4.6.1. Impossibility in the Netherlands: an objective approach

Traditionally a distinction is drawn between relatively and absolutely impossible attempts. Relatively impossible attempts are attempts where the means or the object is generally suitable for bringing about the envisaged harm, but due to extrinsic factors the means/object was unsuitable in the case at hand.[64] These attempts give rise to criminal liability as they still carry an inherent danger of causing harm. Think for instance of a case where someone tries to kill his mother-in-law with a non-lethal dose of strychnine. Absolutely impossible attempts, on the other hand, are attempts that under no circumstances can lead to the envisaged result, like for instance killing a corpse. These attempts will not give rise to criminal liability, as they pose no danger.

Unlike (relative) factually impossible attempts, legal impossibilities (mistakes of law) are not punishable. Consider the example of two foreign men demonstrating for gay rights in The Hague, believing that such a demonstration is prohibited in the Netherlands. The prevalent view rejects liability, because the consummation of the presumed criminal offence is legally impossible.[65] This is in line with the underlying objectivist theory of attempts, where the objective element plays a more important role than the subjective, i.e. the evil, intentions.

4.6.2. Impossibility in England and Wales: a subjective approach

The subjective approach in regard to impossible attempts is firmly rooted in English law. Section 1(2) and (3) of the Criminal Attempts Act 1981 reads as follows:

> '(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.
> (3) In any case where –
>   (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
>   (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having an intent to commit that offence.'

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[64] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 395.

[65] C. M. Pelser, 'Preparations to commit a crime – The Dutch approach to inchoate offences' Utrecht Law Review (2008), p. 61.

What matters thus is whether on the facts as the defendant believed them to be, the actor's conduct was more than merely preparatory. Generally, English law distinguishes two categories of impossible attempts. On the one hand there is the category of legal impossibility, wherein the defendant achieves everything that he set out to do, but contrary to what he believes the intended result does not constitute a criminal offence. There is a wide consensus that an imaginary offence should not lead to criminal liability.[66] The House of Lords endorsed this view in *R v Taaffe*.[67] In this case the defendant imported what he believed to be foreign currency into the United Kingdom, which he thought constituted a criminal offence. Effectively it did not and furthermore it turned out that the packages he attempted to smuggle did not contain currency but cannabis. The Court held:

> 'When the state of an accused person's mind and his knowledge were ingredients of the offence with which he was charged, he has to be judged on the facts as he believed them to be. Accordingly, since the respondent mistakenly believed that by clandestinely importing currency he was committing an offence, his mistake of law could not convert his action into the criminal offence of "being knowingly concerned" in the importation of a controlled drug […] since he had no guilty mind in respect of that offence.'

The second category, which has proved much more controversial over the years, are factually impossible attempts. Under this category fall cases where the intended objective would have constituted a criminal offence but the completion of the crime was scuppered due to the existence of facts unknown to the defendant.[68] The House of Lords had to deal with such a case in *R v Shivpuri*.[69] In this case the defendant was apprehended by custom officials while in possession of a suitcase. He admitted that it contained heroin, but analyses showed that the substance in the suitcase was snuff. The accused was charged with attempting to distribute heroin. On appeal the question arose whether factual impossibility would amount to a defence. The House of Lords held that the defendant intended to smuggle heroin and that his conduct was more than merely preparatory in furtherance of this objective.

In the light of this decision it becomes clear that factual impossibility is no defence to the crime of attempt in the English penal system. It is sometimes argued that this amounts to punishing mere thoughts, or that a conviction in such cases would infringe the principle of legality.[70] However, viewed from the subjectivist perspective, this outcome is defensible, as the culpability of the actor for taking the risk that certain circumstances exist is not diminished by the objective fact that they do not.[71]

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[66] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 361.

[67] R v Taaffe [1984] 1 AC 539.

[68] K. Arenson, 'The Pitfalls in the Law of Attempt: A New Perspective' The Journal of Criminal Law (2005), pp. 162 et seq.

[69] R v Shivpuri [1986] 2 All ER 334.

From the foregoing it can be derived that English law uses for the demarcation of (punishable) impossible attempts and (non-punishable) imaginary offences the distinction between mistakes of law and mistakes of fact. This distinction already follows from the wording of section 1(2) of the 1983 Criminal Attempts Act which makes it clear that a given mistake must relate to *facts*.

4.6.3. *Impossibility in Germany: a mixed approach*

Corresponding to the prevalent mixed rationale for punishing attempts in Germany, the approach taken towards impossible attempts in this system also shows the influence of objective as well as subjective factors. Subjective considerations are present in the generic rule which follows from §23 (3) GCC that factually impossible attempts ought to be punishable. Objective considerations on the other hand are discernible in the fact that legal impossibility is not considered punishable.[72]

What makes German law quite unique is that it accepts a separate category of impossible attempts where, due to gross ignorance about the causal facts and circumstances of the case, the offender fails to realise that the attempt could under no circumstances have led to the completion of the offence. This category is distinguished from superstitious attempts (and of course also imaginary attempts) which are considered not punishable. According to §23 (3) GCC the Courts may in these cases order a discharge or mitigate the sentence as it sees fit under §49 (2) GCC. Under this category fall scenarios which no person in his right mind would take seriously. The perpetrator in these cases fundamentally errs about the laws of nature, so that an impartial observer would figuratively speaking, shake his head in disbelieve and shout, 'you moron!'.[73] One could thus subsume here cases where the perpetrator tries to shoot down an airplane travelling at a high altitude with his handgun or tries to poison his wife by using mint tea. In the Netherlands such attempts would be qualified as absolutely impossible attempts, as the applied means can under no circumstances lead to the commission of the offence.

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[70] B. Hogan, 'The Criminal Attempts Act and Attempting the Impossible' Criminal Law Review (1984), pp. 584 et seq.

[71] R.A. Duff, 'Criminal Attempts' (Clarendon Press 1996), p. 163.

[72] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 455 et seq.

[73] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 452.

4.7. VOLUNTARY WITHDRAWAL

The absence of any tangible form of harm as a characteristic feature of attempt liability can raise the question of how to deal with cases where the would-be perpetrator experiences a sudden change of heart and voluntarily abandons his attempt. Should a person for instance profit from remorse which led him to desist after already having the victim in his sights?

4.7.1. The common law versus civil law approach

One crucial rationale for punishing attempts is to allow timely intervention by law enforcement before any harm has occurred and to seize and restrain the socially dangerous. Arguably a genuine change of heart proves that intervention and restraint were unnecessary in that situation. Furthermore, on a more subjectivist note, it could be said that voluntary withdrawal shows that the actor is not as dangerous as initially thought, as his criminal will was insufficiently strong to carry out the criminal act, and is therefore not the type of person the law should be concerned with.[74] Yet whether or not one is willing to accept these arguments hinges to a large extent on one's general conception of (attempt) liability. It is here where the differences between the English common law and the civil law approach to attempt liability become most visible.

In England once the actus reus and mens rea of a criminal attempt are present, liability will ensue. A criminal attempt is accordingly seen as an offence in itself. Hence, once a person has exceeded the threshold of merely preparatory acts, it cannot make a difference whether the crime was not completed because of voluntary desistance or for any other conceivable reason.[75] Corresponding to this conception of attempt liability, English law does not acknowledge voluntary withdrawal as a defence.[76] It needs however to be noted that voluntary withdrawal is an important factor at the sentencing stage and frequently leads to mitigated punishment.[77]

Conversely, in the Dutch and German system attempt liability is seen as (only) a stage of development in the consummation of the offence, creating room for a person to change his mind and abandon the criminal enterprise. In the Netherlands the concept of voluntary withdrawal is enshrined in Article 46(b) DCC which provides:

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[74] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 186, 190.

[75] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 483.

[76] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 353–354.

[77] K. Arenson, 'The Pitfalls in the Law of Attempt: A New Perspective' The Journal of Criminal Law (2005), p. 162.

> 'Neither preparation nor an attempt to commit a serious offence obtains where the serious offence has not been completed by reason only of circumstances dependent on the perpetrator's will.'

Likewise §24 GCC provides:

> '(1) A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if he has made a voluntary and earnest effort to prevent the completion of the offence.
>
> (2) If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability, if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.'

Both systems thus allow a person to escape liability if he forestalls the consummation of the criminal offence. Preconditions for this escape route are that the actor has entered the attempt phase and that at the time of the withdrawal the offence in question could still be realised.

4.7.2. Preconditions for withdrawal: the need for an (in)complete attempt

Whether and under which conditions a voluntary withdrawal is possible depends foremost on the nature of the attempt itself. We have to distinguish here between failed, complete and incomplete attempts. Voluntary withdrawal will not be possible if the offender's attempt has failed. This is the case when the offender's goal can no longer be achieved. For instance, the oxygen cutting equipment with which Francis tries to open a safe has broken down, or the victim of a robbery realises that the gun pointed at him is a replica and refuses to hand over his wallet.[78] Failed attempts, i.e. where the intended goal can no longer be achieved, have however to be distinguished from incomplete and complete attempts respectively. In short, an incomplete attempt is the case when the actor has not yet done all that he needs to do to set the causal chain in motion, for example when he points a gun at the victim, cocks it, but then does not pull the trigger. A complete attempt would be the case where the actor has done everything and now only needs to wait for the result to occur, for example when he has put a time bomb in the victim's house. It follows that in the event of an incomplete attempt, simple voluntary desistance might suffice, while in the case of a complete attempt a concrete counter action will be required (like disarming the time bomb).[79]

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[78] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), pp. 502 et seq.

[79] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 422–423. HR 3 March 2009, NJ 2009, 236.

In practice it can however be difficult to distinguish between incomplete, complete and failed attempts, especially because here a subjective versus an objective approach can also play a significant role. In line with the general subjective approach to attempt liability, German law speaks in this context of the 'withdrawal horizon'. This means that an attempt will be considered incomplete – with the result that simple desistance will suffice – as long as the offender, at the moment when the withdrawal takes place, has *in his view* not done everything necessary to achieve his goal, but believes that by simply continuing to act he could reach it.[80]

To illustrate this subjective approach, consider the following case. The defendant had stabbed the victim in the neck with dolus eventualis to kill. The victim however remained conscious and a fight followed after which the victim lay on the ground, but was still able to speak to the defendant. The defendant subsequently left the room, which allowed the victim to flee through the living room window. Despite the life-threatening injuries the doctors managed to save the victim. The German Supreme Court held that the facts of the case constituted an incomplete attempt from which the defendant could withdraw by desistance (as he had not pursued the victim). It stressed that in regard to the demarcation of complete and incomplete attempts the view of the offender was decisive. Even though the defendant at some point might have thought that he had done everything necessary to kill the victim, he must have changed his assessment of the situation at the moment when the victim managed to flee through the window, so the argument went.[81]

The Dutch system takes a much more objective approach. For instance, in a case where the defendant attempted to kill his brother with a crowbar and severely injured him, but in the course of the beating changed his mind and stopped the beating, the Dutch Supreme Court held that given the actions of the perpetrator and the serious injuries inflicted (the victim had inter alia suffered a pneumothorax), the attempt was completed and that simple desistance would not suffice for withdrawal here. Conversely, in Germany, such cases can be seen as incomplete attempts, with the result that desistance will suffice to invoke voluntary withdrawal. Thus, an objective approach will often at an earlier point in time conclude that the attempt was complete, thereby excluding the possibility of withdrawing by mere desistance, leaving only the possibility of withdrawing by a concrete counter action.

How does the Dutch system distinguish failed from incomplete attempts? The difference with the German system is perhaps best revealed if one juxtaposes two pertinent cases of attempted homicide. In a Dutch case a man had attempted to kill a sleeping woman by connecting two wires of a cable to her toes and plugging the cable into a socket. The woman woke from the pain, but did not die from the electricity and the man unplugged the cable.[82] The Supreme Court rejected the plea of voluntary withdrawal, because the man had only unplugged the cable after his attempt had failed due to circumstances independent of his will, i.e. that the woman had not died from the shock.

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[80] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §24 Mn 12 et seq.; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 528.

[81] 16 February 1993 BGH NJW 1993, 2125. See also: 21 January 1998 BGH NStZ-RR 1998, 134, 8 February 2007 BGH NStZ 2007, 399.

In a similar German decision, A had poured petrol over his wife because she threatened to divorce him. He however did not manage to ignite the petrol with his matches and after a short struggle the wife was able to flee. A pursued her and subsequently strangled the victim until she temporarily lost consciousness. Yet, allegedly due to a sudden change of heart, he desisted from finishing what he had started and left the scene. The Court of Lower Instance had rejected voluntary withdrawal but the German Supreme Court overruled the judgment and held that despite the fact that his initial plan had failed, the offender had realised that he could still accomplish his goal by applying another means (strangulation) from which he had voluntarily withdrawn.[83] The Court thus adopted a more holistic approach and viewed the two attempts as a coherent event which amounted to an incomplete attempt. It becomes apparent that Dutch jurisprudence would assume in those cases that the attempt had failed and exclude voluntary withdrawal, while in Germany, where a more subjective stance is taken, withdrawal would still be possible if the perpetrator had realised that he could still achieve his goal by another means.

4.7.3. The voluntariness requirement

The core issue in the realm of withdrawal is whether it was voluntary. This requirement finds expression in the Dutch penal system in the phrase that the offence must not have been completed by reason only of circumstances dependent on the perpetrator's will. Similarly, §24 GCC makes it clear that the offender must give up the further execution of the offence of his own volition. Thus, the crucial point here is to distinguish and prove a bona fide change of heart from withdrawal prompted by outside forces such as fear of police presence or surveillance.

Both systems seem to favour a psychological approach which considers withdrawal to be involuntary if the circumstances of the situation exerted such pressure on the offender that he had no other choice than to withdraw.[84] The theory thus draws a distinction between autonomous and not autonomous motives for withdrawal. If the decision to withdraw emanated from the offender's own free will, voluntariness will be assumed. If the decision was however prompted by external stimuli the withdrawal will be involuntary. Thus, one can apply the following formula as a yardstick in both systems: a withdrawal will be considered voluntary if the offender thinks 'I do not wish to carry on even if I could', while it will be involuntary if he thinks 'I cannot carry on even if I wanted to'.[85]A withdrawal is generally deemed involuntary if the perpetrator has abandoned the criminal enterprise because of the intervention of the police,[86] fear of detection,[87] detection by the victim, etc.

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[82] HR 19 April 1983, NJ 1983, 573.

[83] 7 February 1986 BGH NStZ 1986, 264.

[84] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 591.

To achieve reasonable outcomes and to make the evaluation process more concrete, a more normative criterion is often used, which bases the assessment of voluntariness on the view of a 'reasonable criminal'. Thus if an offender withdraws without any reasonable grounds from the viewpoint of a criminal mind (e.g. because of remorse) from his enterprise, the withdrawal can be considered voluntary. If his conduct is however prudent from the point of view of a reasonable criminal, then the withdrawal will most likely be involuntary.[88] In a Dutch case a withdrawal was for instance deemed involuntary in the case of a sailor who, after the captain had ordered a cabin search to investigate some petty theft, had confessed to the captain that he had eight kilos of cocaine in his cabin. The court held that given the fact that the sailor had no chance to hide the cocaine after the cabin search was ordered, the completion of the offence had been prevented by circumstances independent of the defendant's will, namely the likely detection of his cargo during the search.[89]

The difference between the German and Dutch approaches to voluntariness is however once again that the Dutch penal system adopts a more objective approach, while in Germany voluntariness is determined according to the view of the perpetrator at the time that the decision was made.

However, it is in any case not necessary for the defendant to have withdrawn because of morally praiseworthy motives. The law is not interested in whether or not the defendant withdrew due to a moral epiphany, but the law's focus is rather on preventing the occurrence of harm.[90] Nor is it necessary for only internal factors to have played a role in the withdrawal. External factors can also play a role, as long as the contribution of the perpetrator remains significant. A pertinent example of such a case in the Dutch penal system is one of attempted rape. The defendant had introduced himself to his 17-year-old victim as a movie producer and had lured her to his flat. There he told the victim to re-enact a bank robbery, as a result of which the victim agreed to being tied up. The victim only grew suspicious when he dragged her onto a mattress and began to undress her. The victim tried to resist and finally asked the perpetrator 'what sense would it make to rape me?'. This statement seemingly brought the man to his senses and he desisted from raping the woman. The Supreme Court accepted the claim of voluntary withdrawal given the fact that he could have gone through with the crime.[91] The Supreme Court apparently thought that the external factor of the woman's statement was not the decisive reason that had led to the (internal) change of heart of the defendant. It was thus deemed that the crucial factor in this withdrawal was the perpetrator's conscience.

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[85] This formula is the so-called Frank's formula, named after a well known German academic.

[86] HR 25 October 1988, NJ 1989, 456. 1 February 2005 BGH NJW 2005, 1205.

[87] HR 12 April 2005, ECLI:NL:HR:2005:AS6095.

[88] B.M.E. Mallens and M.J. Hornman, 'Vrijwillige terugtred bij poging' Delikt en Delinkwent (2010), pp. 78 et seq.; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 600.

[89] HR 25 October 1988, NJ 1988, 456.

[90] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 422–425; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 599.

5. CONCLUDING REMARKS

Having outlined the different approaches to inchoate offences, we may now draw some final conclusions. First of all, it has become evident that the Dutch approach to the criminalisation of preparatory acts is quite unique. Although all penal systems use specific preparatory offences in their own right to expand the scope of criminal law in our modern culture of control, the Netherlands has also taken the step of introducing a general doctrine of preparation. This is, however, partly the result of a rather restrictive conception of criminal attempts which led to unsatisfactory results in terms of crime prevention. The systems of Germany and England may not have adopted such a general doctrine, but their increasing use of endangerment offences, and the introduction of legislation like the Serious Crime Act 2007, show that a tendency towards extending the range of criminal law to preparatory conduct can also be perceived in these systems.

As regards the law of attempt, it has become clear that if one puts the three systems on a continuum, the Netherlands adopts the most objective approach, English law fluctuates between a mixed and a subjective approach, while German law adopts a mixed approach with a strong emphasis on the subjective criterion of the perpetrator's intentions. We have seen that these different views may lead to different results when it comes to the determination of the starting point of attempt and the evaluation of impossible attempts. It has also become evident that the English system does not acknowledge voluntary withdrawal as a defence. In common law an attempt is perceived as an (inchoate) offence in its own right and not just a step in the direction of the complete offence.

To conclude, our comparative study has helped us to become aware of the main problem underlying inchoate offences, namely how far we can legitimately expand criminal liability, in a liberal democratic society, without unduly infringing individual freedoms. We have seen how criminal law is increasingly concerned with risk prevention and crime control. In particular, the criminalisation of (specific) preparatory acts bears witness to this change of policy, as these acts are by definition far removed from the occurrence of criminal harm, at least in the traditional sense of the word. It is also important to keep in mind that the scope of liability is inextricably linked to the (investigative) powers of the police in this area of the law. The broader the scope of liability, the earlier the police will be able to intervene. The narrower the scope, on the other hand, the longer the police will have to delay their intervention in order to secure a conviction. Merely focusing on the protection of individual liberties will accordingly almost certainly not do, because once we curtail the possibility of early police intervention to arrest and punish those who are about to commit a crime we threaten public safety and expose others to a significant risk of harm. Since both of these underlying rationales, i.e. the protection of public safety and individual liberties, are legitimate aims and boundaries of any penal system, it becomes apparent that a proper balancing of these considerations is vital to circumscribe the scope of inchoate offences. It has been shown that the contours of the law will vary depending on which of the two rationales is emphasised, and whether the focus is more on the pattern of manifest criminality or subjective criminality.

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[91] HR 15 December 1992, NJ 1993, 333. See also: HR 19 December 2006, NJ 2007, 29.

CHAPTER X
FORMS OF PARTICIPATION

Johannes KEILER

1. INTRODUCTION

As discussed in previous chapters, the doctrines of criminal law traditionally combine to establish individual criminal liability. The paradigmatic case in criminal law is therefore that of a sole perpetrator who is both initiator and executioner of his criminal plans. However, the range of persons that could be involved in crime is often much broader. People frequently cooperate in one form or another in order to bring about a certain criminal result. Several people can for instance work closely together to produce, smuggle and distribute narcotics. Furthermore, it is also conceivable that one person might order or solicit another to commit a criminal offence, possibly promising a reward. Moreover, a person can simply provide aid or assistance, so that the criminal offence can be committed more easily, securely, etc. These cooperative criminal efforts, or cases of complicity, challenge our conceptions of individual responsibility, add a considerable degree of complexity to the evaluation of criminal liability and raise a number of intriguing but nevertheless difficult questions regarding the ascription of criminal responsibility.[1]

For one, on a fundamental level the question arises as to how the relationship between the perpetrator who commits the actus reus of the criminal offence and the participants who do not, but merely contribute to the commission of the offence, is best conceived. Is liability for participation in crime connected to the liability of the perpetrator(s) or is it an autonomous, independent form of liability? Related thereto is the question of how participation ought to be punished? If Simon hands Negan a gun, so that he can kill Rick, is Simon to receive the same punishment as Negan who pulled the trigger? Put differently, should every participant in a criminal offence receive the same punishment or should we differentiate between the different contributions?

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[1] Generally see: C. Kutz, 'The philosophical foundations of complicity law' in J. Deigh and D. Dolinko (eds.), The Oxford Handbook of Philosophy of Criminal Law (Oxford University Press 2011), p. 149.

Questions moreover arise with regard to the doctrinal categorisation of the different conceivable degrees of involvement in a criminal endeavour. As can be seen from the above, people may collaborate in a variety of ways, reaching from 'merely' providing aid or assistance to orchestrating, planning and initiating the respective offence, and it is up to the criminal justice system to devise concepts that can capture the many facets of cooperative criminal behaviour.

Besides this, difficult questions may also emerge regarding the required intent for liability for participation in crime. Is it for instance always necessary that the participant intended to contribute to a (criminal) goal which he shared with the perpetrator, or will a lower standard of culpability be sufficient? The answer to this question considerably shapes the scope of liability for participation in crime. Consider the example of Dave, the owner of a gun shop who sells a customer an alarm pistol, which can easily be modified to fire live rounds. Dave suspects that the customer may do so and use the gun for murder. However, he does not himself intend to facilitate murder, but is rather only interested in making a profit. Can he be liable for aiding in the event that the customer uses the gun to kill his wife?

However, it is not only in garden-variety cases of participation that the applicable mens rea standard is of importance. It can also play an important role in situations where things do not work out as envisaged by the partners in crime. Consider the case of Anthony and Ben working together to rob a liquor store, in the course of which Anthony suddenly kills the uncooperative shopkeeper with a knife. In this case it is clear that Anthony has committed murder, but what about Ben? Will he be held liable for murder as well, at least to a certain extent? One may, perhaps, argue that this 'collateral offence' is part of the risk of being involved in such a dangerous criminal enterprise. If you cling together, you swing together? The answer to these and other questions, regarding the scope of liability for participation in crime, arguably also reveals a tension between the traditional protective function of criminal law and the modern, forward-looking, risk-reducing and risk-managing aims of criminal law.[2]

In this chapter we will deal with the basis upon which people participating in a criminal offence can be held criminally liable. We will see that penal systems have formulated different answers to the questions raised above and have devised a variety of modes of liability to respond to cooperative criminal efforts. In doing so, we will focus in particular on how the German, Dutch and English penal systems have conceived different concepts to cover the whole continuum of possible involvement in a criminal offence. But let us first be clear on the terminology used, and give a general overview of some conceptual challenges all systems have to solve.

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[2] C. Kutz, 'The philosophical foundations of complicity law' in J. Deigh and D. Dolinko (eds.), The Oxford Handbook of Philosophy of Criminal Law (Oxford University Press 2011), p. 149.

2. TERMINOLOGY AND SOME CONCEPTUAL CHALLENGES

2.1. TERMINOLOGY

When trying to make a comparative analysis of participation in crime we have to realise that the terminology applied in different penal systems is diverse and can lead to confusion. It is therefore vital to be clear in our use of terms from the outset. It is proposed to use the following terms as indicated:

1. A perpetrator is a person whose liability is primary. This means that it can be established independently of all other parties involved in the commission of the offence. His liability is direct and not derived from someone else's wrongdoing. The perpetrator can also be called the principal (offender). As we will see, perpetration is quite a broad notion, covering different forms of participation, but what they all have in common is that they encompass primary liability.
2. Accomplices or accessories are all those whose liability is derived from the wrongdoing of the perpetrator. In juxtaposition to the perpetrator, their liability is accordingly termed secondary or accessory. In civil law systems, this category includes notions of aiding and instigation. In the common law systems (of England and Wales) this category refers to notions of aiding, abetting, counselling and procuring.[3]
3. A participant is any partner in crime. This encompasses perpetrators and accomplices.[4]

2.2. THE EQUIVALENCE OF PERPETRATORS AND ACCOMPLICES

As already mentioned, on a fundamental level, a first major challenge for holding participants to a criminal offence responsible is the so-called equivalence problem: how should we theoretically define the relationship between the different participants in terms of their responsibility and subsequently their punishment? Should we make a clear-cut differentiation between their contributions, or are their roles really equivalent?

There seem to be two different approaches that penal systems may adopt. On the one hand, a system might strive for a neat categorisation of participatory conduct into different modes, carrying varying degrees of punishment. It seems to make sense to hold each participant liable according to his particular contribution. On the other hand, it is possible to consider everyone participating in the criminal endeavour to have committed the offence and leave the precise meting out of punishment to the discretion of the courts. Generally, we can take the common law jurisdictions as representative of this 'equivalence' theory, which accepts, at least formally, that all participants should be held liable and punished in the same way.[5] This utilitarian way of thinking about participation is well stated in section 8 of the Accessories and Abettors Act 1861:

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[3] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 637.

[4] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 637.

> 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any act passed or to be passed shall be liable to be tried, indicted, and punished as a principal offender.'

It follows that these two different conceptual approaches are also reflected in terms of sentencing. Some penal systems therefore recognise an obligatory mitigation of punishment for accessories (like Germany[6] and the Netherlands[7]) and some systems that favour the 'equivalence' theory do not officially impose a mitigated punishment for lesser forms of participation (like England). One should however realise that this distinction is merely a superficial one, as it is still possible in the latter category of countries for punishment for accessories to be mitigated at the sentencing stage by judicial or prosecutorial discretion. The reason for this may be found in classical considerations of just punishment. The wrongdoing or culpability of the accomplice is traditionally considered to be less than that of the (main) perpetrator.[8]

2.3. THE DERIVATIVE NATURE OF COMPLICITY

It seems to be a defining feature of accessorial liability that it is commonly perceived as a category of 'derivative liability'. Even the common law systems, which formally accept the equivalence theory and put all accomplices on an equal footing with the perpetrator, adhere to a derivative model of accessorial liability. In short, complicity is not a crime in and of itself (unlike the common law inchoate offences). No one is charged with complicity in the abstract.[9] An accomplice always participates in the acts of another. In this sense, accessorial liability is derivative by nature. This raises several questions that have to be solved by all penal systems.

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[5] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), pp. 189–193.

[6] See §27 GCC that enshrines a mitigation of punishment for the aider.

[7] See Article 49 DCC that holds that the maximum sentence for aiding shall be reduced by a third.

[8] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 654.

[9] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 194.

First, what does it mean to say that the accomplice's liability derives from that of the perpetrator? As Fletcher points out, '[i]t must derive from *something*. The problem is determining what that "something" is.'[10] It now seems to be common ground in all penal systems for the liability of the accomplice to be derived not from the specific status and culpability of the perpetrator, but from the wrongfulness of the criminal offence itself. This means that the perpetrator must have at least acted wrongfully or unlawfully, i.e. that his conduct was not justifiable. Thus, defences that are personal to the perpetrator himself (excuses like insanity) do not sever the derivative link, while defences of general application (justifications like self-defence) break the derivative link.[11] The derivative relationship also means that the perpetrator must have at least attempted or prepared to commit the criminal offence in order for accessorial liability to arise.

A second question, closely linked to the previous one, is how systems may solve the inherent limitations that are the result of the derivative nature of complicity, especially the problem of whether accomplices should still be held liable even if there has not (yet) been a criminal offence, viz. a criminal attempt. Imagine that Giulia incites Pedro to burn down the villa of her rich ex-husband Enzio, but that he changes his mind, or does not succeed in committing the offence, for example because he gets seriously ill before he could actually start to execute his plans. Is it then really acceptable that the 'instigator' could not be held criminally liable as there is no offence from which accessorial liability can be derived? Should we endorse the equivalence of completed instigation and attempted instigation? Or can this problem be solved in a different way? And what about the following problem: what if Michael agrees to lend Max his pistol for a heist that the latter plans to commit, but Michael gets arrested before he can actually give the required gun to Max? Should we distinguish between attempted aid and completed aid? It would seem that if we would say 'no' to this question there is no longer any derivative relationship between perpetrators and accomplices.

Thirdly, the derivative nature of complicity can lead to some other interesting lacunas in the law. For instance, in order to prevent participants from going unpunished because the conduct of the perpetrator is not deemed sufficient to constitute the basis from which the liability of the participants may be derived, for example if the perpetrator can invoke a defence, etc., is it then feasible to conceptually define this form of contribution in such a way that it becomes possible to hold this 'behind the scenes' participant to be as liable as the 'real' perpetrator? In other words, how can we hold a participant criminally liable if he used another person who is not criminally liable as a tool to commit the actus reus of the offence? Some penal systems refer to this issue as the problem of indirect perpetration or perpetration by means.

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[10] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 195.

[11] See: Chapter VIII, section 2.2.

2.4. MENS REA AND DEVIATIONS FROM THE ORIGINAL PLAN

A final challenge each penal system has to address is the following problem: what happens if one participant (perpetrator or accomplice), by mistake or deliberately, commits a crime that does not exactly correspond to the original plan? Conceptually this is primarily a problem of mens rea: how much does any participant have to know about what other participants end up doing in order to be criminally liable for the crime that is actually committed?

This problem may first arise where the actual perpetrator commits another offence than originally intended by the instigator. Imagine that Mark induces Peter to steal some valuable paintings from an art gallery, but that Peter only steals some rare bronze sculptures. What would Mark's criminal liability be if Peter does steal the paintings but on the way out beats up the owner of the gallery? Is it possible to hold Mark liable not only for instigating a burglary, but also for the assault? Similar questions may of course arise when aiders who are only assisting the perpetrator(s) do not know the exact details of the plan that has to be executed. What if Charles agrees to assist Peter with the robbery of a night shop, and Peter ends up killing the shop owner? How much does an aider have to know in order to be held liable for such collateral offences? In short, what is the required mens rea for aiding?

This problem seems to be of particular importance in the so-called joint criminal enterprise. The simplest form of a joint enterprise is when several participants made a common plan to commit an offence, go ahead and commit that offence, but one participant commits a separate offence which goes beyond the original plan. Consider again the aforementioned example of Anthony and Ben teaming up to rob a liquor store. What if Ben was unaware of the fact that Anthony was carrying a knife or the two had previously agreed that the weapon should only be used to threaten? Can Ben nevertheless be held liable for the homicide? The central doctrinal conundrum is thus to determine which form of mens rea will be necessary to hold participants in crime liable for deviations from the common plan.

3. PARTICIPATION IN GERMANY

3.1. INTRODUCTION

If several people cooperate to commit a criminal offence, the German penal system distinguishes between perpetrators (*Täterschaft*) and secondary participation (*Teilnahme*). Depending on the type and form of participation in criminal behaviour German criminal law distinguishes in total five different categories of participation in a criminal offence. These five categories can in turn be summarised again into three forms of perpetration (i.e. direct perpetration and perpetration by means (§25 (1) GCC) as well as co-perpetration (§25 (2) GCC)) and two forms of secondary participation (instigation (§26 GCC) and aiding (§27 GCC)). Before discussing the different forms of participation in crime, a closer look at the relevant articles in the German Criminal Code seems warranted.

§25 GCC dealing with perpetration reads as follows:

> '(1) Any person who commits the offence himself or through another shall be liable as a perpetrator.
> (2) If more than one person commit the offence jointly, each shall be liable as a perpetrator (co-perpetrators).'

§26 GCC dealing with instigation reads as follows:

> 'Any person who intentionally induces another to intentionally commit an unlawful act shall be liable to be sentenced as if he were a principal.'

§27 GCC dealing with aiding reads as follows:

> '(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.
> (2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to §49(1).'

Perpetrators are generally thought to commit the offences in question themselves, while accomplices are deemed to participate in the wrongdoing of another. German criminal doctrine has devised an intricate system to attribute liability to participants in a criminal offence according to their degree of individual guilt and wrongdoing. Thus, German criminal law already distinguishes between the different forms of participation at the level of attribution in terms of the nature or degree of responsibility. The level of responsibility is grouped into different degrees, which diminish from the perpetrator to the accomplice. Perpetrators are eligible for the full punishment enshrined in the criminal offence in question, while aiders, due to their auxiliary role in the commission of the offence, are granted a mandatory mitigation of punishment pursuant to §27 GCC. The instigator, on the other hand, although formally considered to be an accessory to the wrongdoing of the direct perpetrator, effectively takes a medium position as he is eligible for the same punishment as the perpetrator pursuant to §26 GCC.

According to this brief outline the following picture emerges in regard to the different forms of participation in German criminal law:

1. the (direct) perpetrator commits the offence himself, i.e. fulfils all the offence elements of the actus reus directly;

2. the perpetrator by means commits the offence through another by using him as a tool to commit the offence;
3. co-perpetrators commit the offence jointly;
4. the instigator incites another to commit the offence in question;
5. the aider assists another in the commission of the criminal offence.

3.2. DISTINGUISHING PERPETRATORS FROM ACCOMPLICES

Due to the fact that the aider's wrongdoing and culpability for the criminal offence are considered to be less than that of the perpetrator, the distinction between the two categories has traditionally been of vital importance in Germany. To distinguish between perpetrators and accomplices, German law nowadays resorts to the so-called 'hegemony over the act doctrine'. The decisive criterion of perpetration in this theory is, crudely stated, the hegemony and control over the execution of the criminal act.[12] Accordingly, a person will be held liable as a perpetrator if he controlled the commission of the offence, considerably influenced the shape and manner of the commission and can thus be seen as the central figure in the crime.[13] Conversely, an accessory is deemed not to be in a position to considerably shape the commission of the offence, despite his obvious influence on the course of events.[14] Thus the intention of the perpetrator as well as his factual contributions to the manifestation of the actus reus need to be taken into consideration.[15] The actus reus of the crime in question formally functions as a vantage point for the evaluation, which is subsequently extended by objective as well as subjective criteria. The objective criteria of the theory encompass the factual hegemony and control over the execution of the criminal act. This will be determined by taking into account the objective contribution of the person and its suitability to exert hegemony, as well as what interest (s)he had in achieving the criminal goal.[16] The subjective element of the hegemony over the act doctrine encompasses the intention of the person. The person must desire to exert hegemony over the act and intend the manifestation of the objective offence definition.[17] The following rough yardstick can be established: if a person's conduct does and is merely meant to support the acts of the other(s) but influenced neither the mode of planning nor the commission of the offence, (s)he will more likely be considered an accessory.

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[12] G.P. Fletcher, 'Rethinking Criminal Law' (Little, Brown and Company 1978), p. 655.

[13] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 210.

[14] C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 10.

[15] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 61; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 210–212.

[16] H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 652. See also: 5 July 1966 BGH NJW 1966, 1763.

There is one further important repercussion of the hegemony over the act doctrine. Arguably a person can namely also possess hegemony over the commission of the offence despite not being directly and physically involved in it. Just think for instance of the boss of an organised crime syndicate. Thus, absence at the factual commission of the offence may not stand in the way of imposing liability as a perpetrator if it can be proven that the defendant played an instrumental role in the preparatory or planning stage of the offence.[18]

3.3. DIRECT PERPETRATION

The first alternative of §25 (1) GCC, sole or direct perpetration, hardly needs any further elaboration. The German system generally applies a restrictive concept of perpetration. Anyone who, by his own hand, brings about the actus reus of the offence in question is considered to be a perpetrator. Thus, if Walter, having obtained a hunting rifle from his friend Jessie, subsequently shoots and kills his wife Skylar during her daily run in the park, Walter is the sole perpetrator of murder (§211 GCC), while Jessie could only incur liability as an aider.[19]

3.4. PERPETRATION BY MEANS

The notion of perpetration by means (*mittelbare Täterschaft*) is, as it is a form of perpetration, just like direct perpetration determined by the hegemony over the act doctrine. §25 (1) GCC succinctly defines the perpetrator by means as the person who commits the criminal act through another. In legal literature the perpetrator by means is more thoroughly defined as the person who uses another person as an instrument to bring about the respective offence definition.[20] This other person will generally not be liable for various reasons. In accordance with the teachings of the hegemony over the act doctrine it is required that the deed can be viewed as controlled by the will of the perpetrator behind the scenes and that his influence controls the 'instrument'.[21] The relationship between the 'instrument' and the perpetrator behind the scenes must be one of subordination. This subordination can stem from a variety of reasons and it might not always be easy to establish in the particular case at hand.[22]

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[17] H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 652. See also: 5 July 1966 BGH NJW 1966, 1763.

[18] See for instance: 18 January 1994 BGH NStZ 1995, 122.

[19] If Jessie for instance also had an interest in killing Skylar liability as co-perpetrator could perhaps also be possible. Generally see: J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 213–214.

[20] H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 663.

One way to establish such a relationship of subordination might be when the perpetrator behind the scenes controls the will of the 'instrument' (*Willensherrschaft*), for example by force, threat, or where the other person acts under duress.[23] Another form of subordination might be established by superior knowledge (*Wissensherrschaft*), where the other person acts due to a mistake. In this respect it is irrelevant whether the 'instrument' erred with regard to a defence, the offence definition, the effect of his acts, etc. What is of relevance in this regard is 'merely', that the 'instrument' is to be treated more mildly by the law due to his mistake in comparison to the situation had he not been mistaken. A further form of perpetration by means is the use of an infant or insane person. Finally a controversial fourth form of perpetration by means based on a person's power within an organisation (*Organisationsherrschaft*) has been developed. Crudely summarised, it can thus be stated that perpetration by means will be applicable in circumstances where on the side of the 'instrument' a lack of guilt, wrongdoing or fulfilment of all the elements of the offence definition can be established.

A spectacular example of perpetration by means can be found in the fairytale-like 'Sirius case'. In this case the defendant met the victim, who was emotionally and intellectually retarded, in a disco. He soon became her spiritual and philosophical leader, and she totally enslaved to him. To get the money from her life insurance he told her that he was from the planet Sirius whose inhabitants were on a much higher plane of philosophical sophistication than mankind. He pretended that he could also elevate her to this level of sophistication but for that she had to destroy her old body and acquire a new one. She would, he claimed, after killing herself awake in a new body as an artist in a red room on Lake Geneva. She was thus not completely aware that she was about to end her life. He instructed her to kill herself by dropping a hairdryer in the bath while she was in it, but the attempt failed. The Supreme Court convicted the defendant for attempted murder by perpetration by means, arguing that he had used his superior knowledge to use the woman as an instrument against herself.[24]

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[21] H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 663.

[22] H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 665.

[23] K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' Journal of International Criminal Justice (2007), p. 211.

[24] 5 July 1983 BGH NStZ 1984, 70.

3.5. CO-PERPETRATION

3.5.1. *General requirements*

Pursuant to §25 (2) GCC the notion of co-perpetration requires the joint commission of an offence by several persons. As co-perpetration (*Mittäterschaft*) is a form of perpetration, the hegemony over the act doctrine is applied here as well. But as several persons work together in the commission of the offence the hegemony over the act rests jointly on the co-perpetrators rather than on one individual. The notion of co-perpetration rests on a particular role allocation meted out in a common plan.[25] In the light of this role allocation and the common plan, the responsibility for an offence is then imputed to the particular co-perpetrators.

The common plan rests upon each participant and each participant is an equal partner in the joint commission of the offence, so that the respective contributions to the deed add up to a whole and the result of the offence can be attributed to each participant.[26] The requisite consensus among the participants can be reached either explicitly or implicitly before the commission of the offence, but can also emerge in the course of the execution of the offence.[27] A co-perpetrator does not necessarily need to know all the details of the common plan, but he or she must know the essential aspects of it.[28]

From an objective point of view, in the light of the common design, co-perpetration requires that each participant makes an essential contribution to the deed. A contribution is regarded as essential if the commission of the deed would be bound to fail without the contribution. The most obvious example of an essential contribution would be the involvement in the actual commission of the crime. However, as already mentioned, jurisprudence, due to the repercussions of the hegemony over the act doctrine, has also assumed co-perpetration on a regular basis in cases where the contribution was rendered much earlier, i.e. in a preparatory stage. The crucial requirement here is that the contribution made at a preparatory stage 'lingers on' in the commission of the crime.

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[25] K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' Journal of International Criminal Justice (2007), p. 21; J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 214.

[26] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 214–219; M. Bohlander, 'Principles of German Criminal Law' (Hart Publishing 2009), pp. 163 et seq.

[27] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), pp. 214–219; H.H. Jescheck and T. Weigend, 'Lehrbuch des Strafrechts: Allgemeiner Teil' (Duncker & Humblot 1996), p. 678.

[28] K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' Journal of International Criminal Justice (2007), p. 212.

In one pertinent decision the defendants were allegedly part of a criminal organisation which had specialised in smuggling cigarettes from the Czech Republic into Germany. On one occasion X had smuggled 21 packets of 88 cartons of cigarettes into Germany. B had subsequently helped to load the packets into a vehicle which he, together with another partner, S, had driven to a nearby petrol station, where they met up with D. The police had however become aware of the group's dealings and arrested the members of the organisation at the petrol station. The Regional Court had acquitted B and D from the joint smuggling of cigarettes on a commercial basis as they had not been directly involved in the importation of the cigarettes. The Supreme Court however quashed the acquittal and referred the case back for re-trial. The BGH set out the following 'sailing order' for the re-trial:

> **German Supreme Court, 15 July 1999, NStZ 1999, 609**
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> 'Regardless of the question when the offence of smuggling has been completed, co-perpetration [...] can also arise when the respective contributions of B and D were, according to the initial plan of the offenders, to be rendered before the completion of the offence.
>
> The assumption of co-perpetration is also not barred by the fact that the defendants (i.e. B and D) did not carry out any actions proscribed by the actus reus of the offence of smuggling. It is sufficient for imputing liability as co-perpetrators that the defendants on a basis of the common plan and criminal intention contributed to the commission of the offence. Such a contribution may also consist of preparatory or other supportive conduct.'

3.5.2. Deviation from the common plan

Generally speaking, actions of co-perpetrators that exceed the common plan cannot be attributed to the other participants.[29] This is particularly so in cases where the perpetrator commits an entirely different deed than intended by the common plan.[30] However, as the common plan does not need to be elaborated in detail, minor deviations from the common design can be attributed to the other participants, if they were of a kind which one could reasonably expect in the execution of the crime and if they do not essentially alter the severity or dangerousness of the offence.[31] Hence the cardinal question in this context is 'whether the act committed by one of the perpetrators was fundamentally different from the performance of the common plan as foreseen by the co-perpetrator'.[32]

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[29] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 218.

[30] K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' Journal of International Criminal Justice (2007), p. 215.

[31] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 218.

The Supreme Court has formulated the principle in the following way: 'co-perpetrators will be liable for any conduct of other partners which was reasonably expectable in the circumstances of the case at hand, even though the conduct in question was not explicitly envisaged by the defendant'.[33]

An instructive decision can be found in the following case. The defendants A and B had met the victim V around 8 pm on the street while on their way to a restaurant. V, who was drunk and in an aggressive mood, barged into A and B and insulted them. Irritated, A and B responded with shoving V, but the situation soon calmed down and A and B went to the restaurant and V to a nearby bar. Shortly afterwards, V left the bar again and saw A and B sitting in the restaurant. V yelled at and again insulted them, which infuriated A and B. The two now decided that V needed to be taught a lesson and, to be sure that they would come out of this situation victorious, A called his brother C, who had been weight lifting intensively for three years. When C arrived at the scene he put on weighted knuckle gloves, which A and B saw and approved of. The three then agreed that V ought to be punished for his behaviour. They found V in front of a pub and there the three jointly assaulted V, who went to the ground and was subsequently kicked three times in the torso by C. Nevertheless, V managed to flee into the bar, but not without first again insulting C. Furious, the three went after him and C continued his assault (still wearing weighted knuckle gloves), while A and B made sure that none of V's friends inside the bar or other bystanders interfered. C landed several blows to V's head and torso, which led to a broken nose and cheekbone. Still, V continued to insult and ridicule C, who as a result grabbed V and hurled him forcefully against the wall, which led to a skull fracture and severe lasting injuries. The Regional Court had convicted A and B inter alia of causing dangerous bodily injuries pursuant to §225 (1) No. 2 GCC, but had acquitted them of the aggravated offence of causing serious bodily injury pursuant to §226 GCC. Only C was found guilty of causing serious bodily injury, as according to the court the hurling of V against the wall amounted to a fundamental deviation from the common plan of A, B and C due to the severity and dangerousness of the conduct. The prosecution subsequently appealed and the Supreme Court overruled the judgment and referred the case back for a re-trial. In the following passages the Court first restates its general approach to deviations from the common plan in the context of co-perpetration and subsequently points out some shortcomings in the Court of Appeal's argumentation.

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[32] K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law' Journal of International Criminal Justice (2007), pp. 216 et seq.

[33] See: 26 April 2012 BGH NStZ 2012, 563.

> **German Supreme Court, 14 December 2016, NStZ 2017, 272**
>
> 'A non-attributable excess [by one of the co-perpetrators – JK] only presents itself in case of substantial deviations from the common plan. Conduct of the other partners which was reasonably expectable in the circumstances of the case at hand will be deemed to be covered by the co-perpetrator's intentions even though he had not explicitly envisaged the conduct in question. The same applies to deviations in which the agreed upon conduct is substituted by one which is equal in terms of severity and dangerousness. Likewise will a co-perpetrator be liable for any modality of an approved criminal offence if he was indifferent to the course of action of the other co-perpetrators.
> [...]
> The Court of Appeal has failed to establish if the three defendants had agreed on a certain form of corporal punishment or agreed on certain limits or if they were ultimately indifferent as to which conduct of the other co-perpetrators would be a part of their retaliatory actions.
> [...]
> Likewise has the Court of Appeal failed to establish whether the conduct which was part of the common plan (punching, kicking, etc.) was not equally dangerous as C's conduct. It is not immediately clear why punches with weighted knuckle gloves were part and parcel of the common plan but not the hurling of V against the wall.'

The general mens rea standard for co-perpetration according to German law, as outlined by the court above, is thus intention (in the form of dolus eventualis). In any case, this case nicely demonstrates that some deviations that were to be expected under the circumstances, respectively mere minor deviations from the original plan or unforeseen outcomes, to which the participant was indifferent, can nevertheless be attributed to a co-perpetrator. This will be possible as long as the deviation does not lead to a substantial change in the severity and dangerousness of the offence.

3.6. FORMS OF COMPLICITY: INSTIGATION AND AIDING

3.6.1. General requirements

As forms of complicity, the liability of the aider and instigator is considered in German law to derive from the wrongdoing of the perpetrator.[34] The corollary of this doctrinal approach is that liability for aiding can only arise after a criminal offence has been committed. It follows that attempted aid will generally not give rise to criminal liability. Thus, if John lends Bob a knife to kill his mortal enemy, liability for aiding can only arise once Bob has entered the attempt phase. The same reasoning would formally also apply to instigation, but the German legislator found this repercussion flowing from the derivate nature of the instigator's liability untenable and therefore introduced §30 GCC, which now criminalises attempted instigation.

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[34] J. Wessels, W. Beulke and H. Satzger, 'Strafrecht Allgemeiner Teil, Die Straftat und ihr Aufbau' (C.F. Müller Verlag 2014), p. 228.

Both aiding and instigation generally require an intentionally committed and *unlawful* act by the perpetrator. This means that assisting a person who can invoke an excusatory defence can give rise to liability for aiding and instigation, whereas this will not be possible if the perpetrator can invoke a justificatory defence, as such defences remove the wrongfulness of the perpetrator's deed and accordingly also remove the necessary foundation for deriving liability. In addition both forms of secondary participation require intentional assistance, respectively instigation to or of the perpetrator's act.

3.6.2. *Instigation*

The actus reus of instigation pursuant to §26 GCC requires causing someone to commit an intentional and unlawful act. In Germany the emphasis thus lies more on the indirect violation of the legally protected interest by the instigator who causes another to commit an intentional and unlawful act. This indirect violation is seen in the communicated inducement of the perpetrator.[35] Accordingly, the means of instigation can take any form of an explicit or implied inducement. One can think here of orders, persuasions, requests or the promise of a reward, as well as suggestions, questions, etc.[36]

The instigator causes another to commit a criminal offence. Thus, the means of instigation must have caused a psychological change in the mindset of the intermediary.[37] The instigator must have evoked the will to commit the criminal offence.[38] Before the instigation the intermediary had no plans (or concrete plans) to commit the criminal offence, but afterwards the will to commit the crime had been formed and the offence committed. We have already heard that the instigator must cause someone to commit a criminal offence, but this does not mean that the instigator must be the *conditio sine qua non* of the offence.[39] A pre-existing proclivity of the instigated person thus does not preclude liability.[40] This is a corollary of the simple practical fact that a person nurturing a certain criminal proclivity will be easier to persuade to commit an offence than someone whose mind is a *tabula rasa*. Even in situations where the instigated person offers his services to the instigator in exchange for a reward, liability for instigation is conceivable, as his concrete decision is dependent on the conduct of the instigator.

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[35] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 3.

[36] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 4.

[37] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 1-2; C. Roxin, 'Strafrecht Allgemeiner Teil, Band II: Besondere Erscheinungsformen der Straftat' (Verlag C.H. Beck 2003), p. 149.

[38] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 1.

With regard to mens rea standards, instigation, just like aiding, requires double intention in Germany. The instigator must intentionally induce the commission of the offence and must intend the offence to be committed. The instigator wishes the offence to be committed by the intermediary and he wants to be the instigator of this crime. Dolus eventualis will be sufficient. The knowledge of the instigator required in relation to the offence to be committed must encompass the essential elements but need not cover every detail.[41] This essentially corresponds to the approach adopted by the English Court of Appeal in *Bryce*, mentioned below in relation to accessorial liability in general.[42]

Taking into account the temporal distance between the instigation and the commission of the criminal offence, it becomes apparent that in theory frictions can emerge if the intermediary deviates from what the instigator initially had in mind. If the deviation is only minor, the broad concept of dolus eventualis will in the majority of cases bridge the gap between what the instigator had in mind and what the intermediary effectively brought about.[43]

However, if for instance the perpetrator commits a less serious offence than envisaged, the instigator can, as his liability is derived from the offence of the perpetrator, only be liable for what was actually accomplished, provided it remains within the general category of offences that was contemplated by the instigator and not something completely different.[44] It is however possible that the instigator will then be liable for attempted instigation pursuant to §30 GCC. If in the converse situation the perpetrator exceeds what was envisaged by the instigator, one will have to distinguish. Generally, the instigator can only be held liable for the crime he intended.[45] If however the instigator was indifferent or negligent as to the result, liability seems possible.

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[39] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 2, 6. See also: 7 September 1993 BGH NStZ 1994, 29.

[40] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 6–9.

[41] 21 April 1986 BGH NStZ 1986, 407. See also: 12 September 1996 BGH NStZ 1997, 281.

[42] R v Bryce [2004] 2 Cr App Rep 592.

[43] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 17–19, 22, 25. See also: 12 September 1996 BGH NStZ 1997, 281.

[44] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 25.

3.6.3. *Aiding*

The concept of aiding is an abstract one and myriad different forms of conduct may be subsumed under it. In general terms it can be stated that any conduct that furthered or made the commission of the offence easier, more secure or swifter can be qualified as aiding. Lending a jemmy to a known burglar or providing weapons for a robbery certainly constitute textbook examples. But opening a bank account under a false name for a friend in order to provide a vehicle for realising the proceeds of forged checks, hiring cars to be used in a robbery, transporting someone to or from the scene, or lending a helping hand during the commission of the crime, as for instance holding a security guard at bay, may also all give rise to liability for assistance.

Jurisprudence, presumably to overcome evidentiary difficulties, requires that the assistance has furthered the offence. A strict causal link between the assistance and the commission of the offence is thus not required by the courts.[46]

The mens rea standards regarding aiding are remarkably similar to those of instigation. It is generally required that (i) a person intends to assist the act of the principal and (ii) that he knew the essential matters that constitute the objective elements of the offence. Thus, one can in general terms also speak here of a requirement of double intention. Dolus eventualis will be sufficient.

Concerning the degree of knowledge of detail as to the criminal offence required by the aider, one can generally say that a generic form of knowledge or intention is required. The assistant's knowledge must encompass the essential factual elements, but need not cover every detail. Generally, the assistant needs to know the *type of crime* that will be committed. It is thus immaterial that he did not know the exact particulars of the respective plan. Those were the merits of the English landmark decision in *R v Bainbridge*, which also reflects the prevalent view in Germany.[47] In a pertinent German case, for instance, the defendant had sold special equipment to the perpetrator so that the latter could empty brand X slot machines. He had also demonstrated the usage of this equipment to the perpetrator in a local pub. With this equipment the perpetrator had over three months emptied several slot machines in the region. The Court of First Instance had acquitted the defendant as he did not know the exact time, place and other circumstances of the commission of the thefts subsequently carried out by the perpetrator. The Appeal Court however overruled the decision.[48]

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[45] A. Schönke and H. Schröder, 'Kommentar zum Strafgesetzbuch' (Verlag C.H. Beck 2014), §26 Mn 25.

[46] See: 16 November 2006 BGH NJW 2007, 384. See also: 8 March 2001 BGH NJW 2001, 2409.

[47] R v Bainbridge [1960] 1 QB 129.

> **Regional Court Bayern, 27 March 1991, NJW 1991, 2582**
>
> 'The Court of First Instance acquitted the defendant of aiding the thefts committed by the perpetrator as he was unaware of the main features of the offences in question. Although it accepted that the defendant would empty slot machines of brand X with the equipment he had sold him, it argued that the main offence(s) remained too indeterminate as the defendant was inter alia unaware of the exact time and location of the thefts.
>
> By applying this reasoning the Court of First Instance has misinterpreted the general mens rea requirements for aiding. An aider ought to know that he is aiding a particular criminal offence of another and that his contribution will facilitate the commission of the offence. He however only needs to foresee the main features of the offence to be committed by the perpetrator. Details of the deed, i.e. when, where, against whom and under which circumstances the crime will be committed need not to be known by the aider.
>
> In the present case it was indeed unknown when, where and to whose detriment the theft would be committed. However, the defendant was well aware that the perpetrator would steal money from slot machines of the brand X. Therefore he had sufficient knowledge of the main offence to be carried out by the perpetrator.'

4. PARTICIPATION IN THE NETHERLANDS

4.1. INTRODUCTION

Just like the German penal system, the Dutch system distinguishes five different forms of participation in crime, depending on the degree and mode of involvement. These are enshrined in Title V, entitled 'participation in a criminal offence', in Articles 47–49 DCC.

Article 47 DCC dealing with perpetrators reads as follows:

> '(1) The following are liable as perpetrators:
> 1. those who commit a criminal offence, either personally or jointly with another or others, or who cause an innocent person to commit a criminal offence;
> 2. those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or providing the opportunity, means or information, intentionally solicit the commission of the crime.
>
> (2) With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.'

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[48] See also: 7 November 2001 BGH NStZ 2002, 145.

Article 48 DCC dealing with accessories reads as follows:

> 'The following persons are liable as accessories to a serious offence:
> (1) those who intentionally assist during the commission of the serious offence;
> (2) those who intentionally provide the opportunity, means or information necessary to commit the serious offence.'

Article 49 DCC provides:

> '(1) In the case of complicity as an accessory, the maximum of the principal penalty prescribed for the serious offence is reduced by one third.
> (2) In the case of a serious offence carrying a sentence of life imprisonment, a term of imprisonment of not more than twenty years shall be imposed.
> (3) The additional penalties for complicity as an accessory are as for principals.
> (4) Only those actions that were intentionally facilitated or promoted by the accessory and the consequences of such actions are to be taken into consideration in sentencing.'

Contrary to common parlance and slightly differently from the German approach, Article 47 DCC distinguishes four forms of perpetration as the instigator is also considered to be liable as a perpetrator. While in Germany instigation is formally categorised as a form of secondary participation, the Dutch system puts the instigator on an equal footing with the perpetrator. This means that there exists in the Netherlands only one form of complicity, i.e. aiding, of which Article 48 DCC formulates two modalities: (i) aiding or assisting during the commission of the offence and (ii) providing the opportunity, means or information necessary to commit the offence. Article 49 DCC foresees a mandatory mitigation of punishment for aiders. Despite minor differences in the classification and scope of the different forms of involvement, both systems distinguish five forms of participation in crime.

4.2. DIRECT PERPETRATION: FROM A RESTRICTIVE TO A FUNCTIONAL APPROACH

The least complicated form of direct perpetration is of course factual perpetration, where the person commits the actus reus himself. The challenge however in any penal system is how to deal with persons who play an instrumental role in conceiving, ordering, organising or controlling the commission of the offence rather than the factual perpetrator who is either unaware of the legal consequences of his conduct, or obeys orders or commands. There are several possible solutions to this problem of allocating criminal liability to 'the mastermind behind the scenes', of which perpetration by means and instigation are the most traditional ones. Depending on the exact nature of the relationship between the factual perpetrator and the one behind the scenes, one may prosecute the latter as a perpetrator by means or as an instigator. We will discuss both forms of participation later on.

There is however another possibility for holding the perpetrator behind the scenes criminally liable, i.e. by enlarging the definition and scope of perpetration itself. We have seen how in Germany this has led to the hegemony over the act doctrine: not only the factual perpetrator is to be considered a perpetrator, but also, and even more importantly, the person who had some form of control over the commission of the offence. A similar development in Dutch jurisprudence has led to a comparable expansion of perpetration with the emergence of the so-called doctrine of 'functional perpetration'.

The notion of functional perpetration evolved gradually over time, but the landmark decision was the infamous *IJzerdraad* (iron wire) judgment in 1954 where the Supreme Court established the conditions under which the functionally responsible person behind the scenes could be held criminally liable. In this case the question arose in which circumstances the conduct of an export manager could be seen as the conduct of the owner of the company.[49] The Supreme Court held that this could be the case if (i) it was within the owner's power to control/determine the employee's conduct, and (ii) the employee's act belonged to a category of acts 'accepted' by the firm as being in the course of normal business operations. Accordingly the 'IJzerdraad criteria' are often dubbed the criteria of power and acceptance.

The notion of power revolves around the factual control of the suspect over the (non-)manifestation of the criminal conduct. This aspect constitutes the normative core of the concept of power. The perpetrator with control over the factual perpetrator is in a (hierarchic) position to prevent the criminal conduct from occurring.[50] The power to control can for instance be grounded in an employment relationship or other variations of subordination, as well as in close co-operation. The notion of acceptance on the other hand is a much more subjective criterion which in essence requires an intentional involvement in the conduct factually committed by another actor.[51] Acceptance can for instance be assumed if the perpetrator was aware of the criminal conduct and embraced, tolerated or even encouraged it. It may be interesting to note that this doctrinal development towards non-restrictive, functional perpetration prepared the ground in the Netherlands for the gradual acceptance of the idea that not only natural persons, but also legal entities can be considered functional perpetrators, and should therefore be held criminally liable. This will be discussed in Chapter XI.

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[49] HR 23 February 1954, NJ 1954, 378.

[50] E. Gritter, 'Functioneel plegen door een natuurlijke persoon' in J.B.J. van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), p. 20.

[51] E. Gritter, 'Functioneel plegen door een natuurlijke persoon' in J.B.J. van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), p. 28.

4.3. CO-PERPETRATION

Article 47 DCC does not mention any criteria for the establishment of co-perpetration, but merely states that those who commit the offence jointly shall be punished as perpetrators. But how strictly should one interpret 'jointly'? The answer is crucial for differentiating co-perpetration from mere aiding. The paradigmatic case of co-perpetration is of course when several people do an act that is part of the actus reus, for instance if in a robbery John wields a gun while his partner grabs the loot, or when in an assault Rick holds the victim while Mark hits him in the stomach. But is it really necessary that all participants contribute equally to the actus reus, or is a more extensive approach allowed, comparable with what we have seen in Germany?

4.3.1. Conscious, complete and close cooperation

As early as 1934, the Dutch Supreme Court moved from a restrictive concept of co-perpetration to a more open one. In the case at hand, two men had according to a common plan set fire to a barn. The defendant in this case had held the ladder which his partner in crime used to climb to the loft to set fire to the hay stored there. At first, they were unsuccessful, as the hay seemed wet and did not catch fire, and a second attempt with dryer hay from the ground floor, which the defendant handed to his partner, also failed. Eventually, however, the hay caught fire and the barn burned down. The defence had argued that the Court of Lower Instance had wrongly convicted the defendant as a co-perpetrator of arson, as he had not committed any part of the actus reus of arson, but had merely provided help by holding the ladder, an argument based on a strict restrictive view of perpetration. The Supreme Court held that, taking into account the common plan of the two arsonists, their cooperation was so complete and close that it was in the end coincidental that the fire was effectively only set by the defendant's partner. The conduct of the defendant could therefore not be characterised as providing assistance, but rather as co-perpetration.[52] Thus, the Court established that an actual contribution to the manifestation of the actus reus was not required for the establishment of liability as a co-perpetrator, as long as the cooperation was intentional, complete and close. This requirement, i.e. *conscious, complete and close cooperation*, became the distinctive criterion for co-perpetration. It evidently consists of two parts, an objective one, i.e. complete and close cooperation, and a subjective one, i.e. the cooperation has to be conscious, hence intentional. The determining factor thus seems to be the intensity of the cooperation and from this landmark decision it can be deduced that a common plan or the exchangeability of roles can both be used to establish sufficiently close cooperation.[53]

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[52] HR 29 October 1934, NJ 1934, 1673.

4.3.2. Is physical presence necessary?

A concrete physical contribution during the commission of the crime is no longer required for the establishment of co-perpetration. But is it also conceivable that a participant's contribution during the preparatory phase, or even after the act, is so substantial that this amounts to co-perpetration? In other words, is there any kind of physical presence necessary for co-perpetration?

Arguably there is a risk if one were to accept this possibility too easily, as the boundaries between perpetration and aiding may become unclear. Activities which are traditionally seen as aiding the commission of a crime, like procuring burglary tools or hiding the booty, would then be subsumed under the heading of (co-)perpetration. On the other hand, if a specific form of (preparatory) assistance is so essential for the commission of the offence, would it then still be just to qualify this behaviour as mere aiding? This is especially relevant for combatting more organised forms of crime. In addition, the person in the background conceiving and shaping the criminal behaviour (the mastermind) should be held liable as a co-perpetrator and not as an accomplice.

Unsurprisingly it is now accepted in Dutch jurisprudence that neither a physical contribution nor presence at the commission of the crime is necessary for the establishment of co-perpetration. The Dutch Supreme Court started to develop this approach in 1981. The defendant in the case at hand had orchestrated the theft of semitrailers. He had planned the crime, chosen the trailers which should be stolen, had falsified letters of consignment to be shown to the police in the case of a traffic control, and provided a truck to transport the containers and a shed to which the loot could be brought. However, the defendant was not present at the theft of the trailers, which was carried out by his partners. The Supreme Court left the conviction for theft in co-perpetration intact and ruled that a physical presence at the *locus delicti* was not required, as long as the defendant had cooperated completely and closely with his partners.[54] Nevertheless, the role of the not-present perpetrator in the preparatory phase or after the fact must have been a significant one in order to justify liability as a perpetrator.

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[53] M.M. Van Toorenburg, 'Medeplegen' (Deventer 1998), p. 126; J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), pp. 454 et seq.

[54] HR 17 November 1981, NJ 1983, 84.

4.3.3. Is physical presence sufficient?

The question may arise as to whether someone who is present during the commission of the offence and fails to distance oneself can be held liable as a co-perpetrator. While (continued) presence at the scene can in some circumstances be interpreted as contributing to the crime, especially where a person is present by virtue of a pre-arranged plan, it stands to reason that if we would apply this in a strict manner, such an approach would create a collective risk-responsibility, in cases where several people cooperate to bring about a prohibited harm. This would come close to the proverbial 'cling together, swing together'. According to the individual guilt principle it seems to be generally accepted that mere presence during the commission of the crime is insufficient to amount to co-perpetration.

The fact that a failure to distance as such is insufficient to establish co-perpetration is substantiated by a judgment from 2008. In this case, pieces of paving stone were thrown onto a motorway from a viaduct straddling the road. One of the pieces broke the windshield of a car, as a result of which the driver lost control of his vehicle and crashed into the crash barrier, which caused his death. Four adolescents were prosecuted for murdering the driver of the vehicle. But only two of the boys had effectively thrown the stones, while the others were merely present at the scene. Both the Court of First Instance and the Court of Appeal had acquitted the latter two as the mere failure to distance themselves was deemed insufficient to amount to co-perpetration. The Supreme Court upheld the acquittal. Here are some crucial paragraphs from the Supreme Court's decision, starting with a summary of the public prosecutor's argument for co-perpetration.

Dutch Supreme Court, 18 March 2008, NJ 2008, 209

> '3.2.2 The indictment of the Advocate General at the Court of Appeal involves the following:
>
> "Despite the fact that [suspect] himself has not thrown a stone and has therefore not executed the act himself, I believe that he was nevertheless so much involved in the throwing of the pieces of paving stone that he should be considered to be a co-perpetrator. According to the state of current jurisprudence, the bottom limit of co-perpetration is established by:
>
> - being part of a group and not just being present by accident;
> - not distancing oneself from that group if wrongful and criminal actions are taking place that are not unforeseeable, unexpected or sudden;
> - failure to intervene, thereby preventing co-perpetrators to commit offences, when it is foreseeable that new offences will be committed.
>
> The investigation revealed that the four suspects have acted as a group. The group drew together and moved a car from one location to another. Moreover, throwing the paving stone came to [suspect] as no surprise. He has foreseen what

> was going to happen. There have already occurred several similar incidents and all suspects, including [defendant], knew about that. [Suspect] commented that he soon felt that [fellow suspect 2] and [fellow suspect 1] were going to do something weird. He had the idea that [fellow suspect 2] did not see the seriousness of the matter. [Suspect] also stated that he had discussed with [witness] that they hoped that [fellow suspect 2] and [fellow suspect 1] were not going to do something crazy. [Suspect] has then said that he hoped they would not throw a brick or something like that. [Suspect] also stated that he heard [fellow suspect 1] and [fellow suspect 2] say they were going to throw something. Given the number of incidents and the time course of the events that evening, [suspect] could have distanced himself from the actions of his co-defendants. That did not happen. In his own words, he was unhappy with the state of affairs and he would also have expressed this to his co-defendants. According to his statement [suspect] was aware that he would be criminally liable for the actions of his friends. He literally says: '... and I was afraid, because I was there when they were throwing and I was afraid that I would be an accomplice.' It is therefore remarkable that [suspect] decided to remain, even after having heard the remark of [fellow suspect 1] and [fellow suspect 2] that they were going to throw something, just before the fatal incident with the paving stone on the viaduct. Given the position of the car and where he was seated [defendant] must have seen that [fellow suspect 1] and [fellow suspect 2] had the tile pieces in their hands. He made no attempt to prevent [fellow suspect 1] and [fellow suspect 2] from throwing the tiles from the viaduct. Therefore, [the defendant] can be convicted as a co-perpetrator."'

The Court of Appeal however acquitted the defendant of co-perpetration with the following pivotal motivation:

> '[T]he Court considers that the defendant has not committed any part of the actus reus, and neither has it been established that he agreed with throwing the pieces of paving stone. Also in relation to this last aspect, there have been no other facts or circumstances which should lead to the conclusion that there has been a close and complete cooperation between the suspect and the two fellow suspects.'

The Dutch Supreme Court upheld this decision:

> 'The Court has acquitted the defendant for co-perpetration of murder and considered that in this respect the legal and convincing evidence is lacking. The Court has [...] examined whether there has been such a close cooperation between the suspect and the two fellow suspects that defendant may be qualified as a co-perpetrator. The Court answered in the negative and held that the accused has not committed any part of the actus reus and that neither has it been established that he agreed with throwing the pieces of paving stone. In particular in relation to this last aspect, the Court further found that other facts or circumstances which should lead to the conclusion that there has been a close and complete cooperation were lacking. Part of the Court's consideration is the opinion that the circumstance mentioned by the Advocate General that the defendant, according to the public prosecution, had knowledge of what was about to happen, but did not distance himself, is in the given circumstances

> insufficient to establish the required conscious and close cooperation This opinion does not show a wrong understanding of the concept of "co-perpetration", while it does not exclude the possibility that such a conscious and close cooperation can also be reached "implicitly".'

Generally, one may thus conclude from jurisprudence that the mere failure to distance oneself is insufficient to establish co-perpetration. At most it can only offer an additional argument by which the intensity of a pre-existing cooperation can be proven.[55]

4.3.4. The Supreme Court gives an overview

In 2014 the Dutch Supreme Court summarised its earlier case law and gave a general overview about the doctrine of co-perpetration. The court emphasised that the question when certain conduct could be classified as co-perpetration was of great practical importance but could only be answered on a case by case basis. To make application of the law clearer the Supreme Court therefore highlighted several doctrinal points of interest and also came forth with a non-exhaustive list of factors that may indicate a close and complete cooperation between the participants. It thereby also touched upon the difference between co-perpetration and aiding.

Dutch Supreme Court, 2 December 2014, ECLI:NL:HR:2014:3474, NJ 2015, 390

> '3.1. Even if someone has not fulfilled all elements of a certain offence definition himself, Articles 47–51 DCC contain several options to hold someone [...] liable for his involvement in a criminal offence, provided that certain requirements are fulfilled. In case of co-perpetration the conditions for liability require that a conscious, complete and close cooperation can be established. The emphasis thereby rests on the notion of cooperation and less on the question who committed which factual conduct. In praxis it is an important and difficult question when a cooperation was so close and complete to amount to co-perpetration. [...]
>
> 3.2.1. Classifying conduct as co-perpetration seems only justified if an intellectual and/or material contribution of sufficient weight by the defendant can be established. [...] This is especially important as in this context one is often faced with the question if a certain conduct amounts to co-perpetration or aiding. [...]
>
> 3.2.2. This means that if the alleged co-perpetration does not essentially consist of the joint execution of the criminal offence but of conduct which is often associated with aiding (such as providing information, functioning as a lookout and providing assistance during flight), the judge if he nevertheless wants to establish co-perpetration, is under a strict obligation to carefully motivate his decision. When deciding whether or not the necessary complete and close cooperation

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[55] See for instance: HR 14 October 2003, NJ 2005, 183.

> for co-perpetration can be established the judge may consider factors such as: the intensity of the cooperation, the division of tasks among the partners, the role in the preparatory phase, the commission or execution of the offence and the importance of the defendants' role therein, the presence of the defendant at crucial moments during the commission of the offence and his failure to distance himself from the criminal enterprise at a suitable time. In this context it has however to be noted that a failure to distance oneself on its own is not of great significance for establishing co-perpetration (as established in previous case law). After all, the crucial element [of co-perpetration – JK] is that the defendant contributed essentially to the commission of the criminal offence. [...]
>
> 3.2.3. The contribution of the co-perpetrator will in general be rendered during the commission of the criminal offence in the form of a joint execution of the crime. But the contribution can also be rendered in the form of different conduct before and/or during and/or after the criminal offence. In addition, it can also not be ruled out that the contribution [of the co-perpetrator – JK] is mainly rendered before the commission of the criminal offence.'

Thus, in this landmark decision the Dutch Supreme Court provides on the one hand further guidance regarding the exact application of the doctrine of co-perpetration.[56] On the other hand, the Supreme Court also sought to distinguish the concept of co-perpetration more clearly from the bordering notion of aiding. According to the Court, the difference between these forms of participation can arguably be found in the weight and quality of the contribution that the co-perpetrator, respectively the aider provides. While a co-perpetrator contributes significantly to the commission of the criminal offence, the aider (merely) supports or facilitates the commission of a criminal offence. Thus the intention with which a contribution is rendered will also be of importance.[57] The Supreme Court thus confirmed the openness of the requirement of complete and close cooperation, which provides room for the lower courts to adjust the concept, based on a non-exhaustive list of factors, to the case at hand.

4.3.5. *Deviation from the common plan*

As the criminal liability for co-perpetration is largely based on the common purpose or plan according to which the offence was committed, it seems to follow that deviations by one participant can generally not be attributed to the others. Yet, as the common plan does not need to be elaborated in detail, some deviations from the common design can under certain circumstances be attributed, if they were of a kind which one could reasonably expect to occur in the execution of the crime.[58] In general the inherent dangerousness of the conduct agreed upon, as well as the dangerousness of the means and instruments applied (e.g. usage of blunt objects, a knife or a firearm), will be important factors in the consideration of whether or not participants can be held liable for the collateral damage. The concept of dolus eventualis can facilitate the attribution of deviations from the common plan greatly in the event that the defendant knowingly and willingly exposed himself to a considerable chance that a certain consequence would result from his actions.[59]

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[56] See also: A. Postma, 'Facetten van medeplegen' Delikt en Delinkwent (2015), pp. 123–141.

[57] A. Postma, 'Facetten van medeplegen' Delikt en Delinkwent (2015), p. 131 et seq.

[58] HR 10 April 2007, NJ 2007, 224.

The following case might serve as an example here. After an argument with a group of Albanians in a nightclub, the brothers A and B went to A's house to pick up a gun and to subsequently confront the Albanians again. B had taken the gun and tried together with A to re-enter the nightclub, but the bouncers refused to let them in again. As a result, B randomly fired three shots at the closed door of the nightclub (allegedly to hit the bouncers), which caused the death of two young women standing behind the door. The defence had argued that the defendant had not accepted the considerable chance that his brother would fire at the bouncers. The Supreme Court however concurred with the reasoning of the Court of Lower Instance and held that given the fact that he was aware that his brother was carrying a gun and that his brother under certain circumstances could act violently, the defendant had accepted the considerable chance that his brother would act violently and maybe use the gun on their return to the nightclub.[60]

This example demonstrates that the concept of dolus eventualis will often mitigate the problem of differing intentions between co-perpetrators. It seems that only the most blatant and unforeseeable deviations from what the perpetrators had in mind cannot be attributed to a co-perpetrator in the Netherlands.

Recent case law also seems to adopt a more objective (causality based) rationale to attribute deviations from the common plan.

For example, the Supreme Court has ruled that the collateral offence of causing a deadly accident by dangerous driving can also be committed in co-perpetration if this conduct was (directly) connected to a prior offence committed in co-perpetration. In the case at hand, two men had caused the death of a pedestrian during their attempt to flee from the police after an unsuccessful robbery. The court held that if two men jointly commit a robbery (crime A) or attempt to, they may also be held jointly responsible for each other's actions during an ensuing getaway (crime B) if the risk of crime B was inherent in crime A. This was the case even if no agreement as to this conduct had been reached between the co-perpetrators and despite the fact that the passenger could hardly influence the actions of the driver. The defendants were thus convicted of negligently causing a deadly accident in co-perpetration and sentenced to four years' imprisonment.[61]

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[59] See: Chapter VII, section 2.3.

[60] HR 8 May 2001, NJ 2001, 480.

4.4. PERPETRATION BY MEANS

Perpetration by means was originally created to hold the person behind the scenes criminally liable if the factual perpetrator himself is innocent. This may for instance be the case where the instigator of the offence makes use of a child, or a person acting under mistake or someone insane at the time of the commission of the offence. Suppose that the nanny Christine asks eight-year-old Michael to take a rare and valuable book from his father's library, suggesting that it is really her own book. In this case Michael cannot be held liable because he is below the age of criminal responsibility. The intuitively correct solution for such cases is to punish the person who manipulates the innocent agent as a means to his or her criminal end.

It is important to note that the notion of perpetration by means is hardly used any more due to the existence of the notion of functional perpetration.

4.5. INSTIGATION

Closely related to perpetration by means is the doctrine of instigation, which is qualified in Article 47 DCC as a form of perpetration. Both forms of participation deal with the inducement of one person by another to commit a criminal offence. The reproach is accordingly in both situations that they have caused an intermediary to commit a criminal offence. The main difference however lies in the criminal status of the intermediary. While generally speaking, according to the doctrine of perpetration by means, the intermediary must not be criminally liable, i.e. must be an innocent agent, in relation to instigation the intermediary must be criminally liable for the offence committed.

As the instigator induces another to commit a criminal offence, this implies that the instigator must have caused a psychological change in the mindset of the intermediary.[62] Before the instigation the intermediary had no (concrete) plans to commit the offence, but afterwards the will to commit the crime has been formed and the offence is committed. However, this does not mean that the instigator must be the sole cause (the *conditio sine qua non*) of the offence. If there was already an existing desire to commit the offence, this will not preclude instigation if the means used actually form the extra persuasion to commit the crime. On the other hand, the fact that the instigator must cause the commission of the offence excludes cases where the person is already determined to commit the offence. It is however possible for his actions to still amount to aid and hence lead to liability as an accessory.

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[61] Gerechtshof 's-Hertogenbosch, 22 June 2016, ECLI:NL:GHSHE:2016:2428. This decision was later upheld by the Supreme Court in: HR 20 February 2018, ECLI:NL:HR:2018:241.

[62] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 485; H.G.M. Krabbe, 'Uitlokking' in J.B.J. van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), p. 139.

4.5.1. *Means of instigation*

An interesting difference between the German and Dutch approaches to instigation is that Article 47 DCC circumscribes the means by which one can instigate, while in §26 GCC such a specification is absent. Article 47 DCC enumerates nine means which can be used for instigation, namely gifts, promises, abuse of authority, use of violence, threat or deception, and providing the opportunity, means or information. The form of a conclusive enumeration was initially chosen for the sake of legal certainty, but the broad interpretation given to these means in practice has diminished this endeavour.[63] With regard to providing information, this must amount to more than a simple encouragement to commit the crime in question. It must consist of communicating facts or circumstances by which the commission of the offence is made possible or facilitated.[64] While this definition still retains some value, in 2000 the Dutch Supreme Court adopted a new definition of providing information. In the case at hand, the Supreme Court held that providing information could be seen in a phone call from a mother to her son, telling him that an acquaintance had threatened to kill her, knowing that her son had a history of violent behaviour.[65] The Court held that providing information encompassed factual statements which are important for the commission of the envisaged offence, in the sense that they are suitable in the circumstances of the case to procure the commission of the offence. By requiring that the information constitutes a factual statement, it is quite clear that there is still room for statements that only morally encourage, which are not a means of instigation. The difference seems to be that information is factual in nature, whereas this is not necessarily the case for simple encouragement.

Although the means of instigation are interpreted broadly in the Dutch system, some means are still excluded. Not only encouragement, but also persuasion, begging, provoking or daring are insufficient means.[66] This is notably different to the situation in Germany, where any means causing another to commit a criminal offence will be sufficient.

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[63] See also: WODC report, Daderschap en deelneming doorgelicht, pp. 111 et seq.

[64] HR 29 October 1991, NJ 1992, 267.

[65] HR 27 February 2001, NJ 2001, 308.

[66] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 485.

4.5.2. *Mens rea of instigation*

Instigation requires double intention. The instigator must intentionally induce the commission of the offence and must intend the offence to be committed. The instigator must wish that the offence be committed by the intermediary and must want to be the instigator of this crime. Article 47(1) sub 2 DCC contains the requirement that the instigator intentionally solicits the commission of a crime. The importance of this requirement is underlined by Article 47(2) DCC, which aims at situations where the intention of the instigator diverges from the intention of the intermediary. The instigator must thus intentionally solicit the commission of a crime, thereby using one of the nine means listed in Article 47 DCC. Furthermore, the instigator must act intentionally with regard to the particular offence which he wishes to be committed.[67]

4.5.3. *Deviation from the instigator's plan*

How does the Dutch system deal with situations where the perpetrator deviates from what the instigator had in mind? If the deviation is only minor, the concept of dolus eventualis will bridge the gap between the instigator's intention and what actually took place. A nice example can be found in a case where A instigated B and C to steal a colour copier from a copy shop which he needed to forge money, by promising B and C a financial reward. B and C set out to steal the copy machine but returned with a black and white copier. A sent them back to the copy shop to steal the colour copier, but they were arrested by the police at the scene. The defence had argued that A's intention was to instigate the theft of a colour copier and that he could not be held liable for instigating the theft of the black and white copier. The Supreme Court however held that A had accepted the considerable chance that another copy machine than intended by him might get stolen when he 'hired' B and C to carry out the theft.[68] Thus, due to the broad concept of dolus eventualis, it can be said that the crime committed must correspond in a general way to what the instigator intended.

4.5.4. *Attempt to instigate*

As we have seen, all forms of participation are derivative by nature; they depend on the commission of, or at least the attempt to commit, an offence. This is of course no less true for the liability of the instigator. But what if there is not even an attempt to commit the instigated crime, let alone a complete offence? What if the instigated person changes his mind, or does not succeed in committing the offence, for example because he gets arrested before he could actually start to execute his plans? Like in the German system, the Dutch legislator considers it to be unacceptable if such circumstances were to lead to the instigator's non-liability. Article 46a DCC therefore criminalises attempted instigation:

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[67] J. de Hullu, 'Materieel Strafrecht – Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 480; H.G.M. Krabbe, 'Uitlokking' in J.B.J. van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), pp. 141–144.

[68] HR 29 April 1997, NJ 1997, 654.

> 'An attempt to instigate another to commit a crime by employing one of the means listed in Article 47(1), no. 2 is punishable, provided that no sentence is imposed that is heavier than that which may be imposed for an attempt to commit the crime, or, where such an attempt is not punishable, for committing the crime itself.'

As discussed in Chapter IX, this corresponds to the situation in England where 'attempted instigation' originally gave rise to liability for incitement (an inchoate offence), which has now been replaced by the Serious Crime Act 2007. It is important to keep in mind that the notion of the attempt to instigate should not be confused with the mirror notion of instigation to an attempted crime, for example when the instigated person shoots but misses his victim. In such a scenario the derivative nature of the instigation remains completely intact as there is at least an attempt to murder. In addition, it should be remembered that only the attempted instigation is punishable pursuant to Article 46a DCC, but attempted aid is not considered punishable.

4.6. AIDING

From the wording of Article 48 DCC one can already distil some important features. Firstly, the article distinguishes between two different forms of aiding. Article 48(1) DCC deals with so-called concurrent forms of aiding; the accessory assists *during* the commission of the criminal offence. Article 48(2) DCC on the other hand deals with preceding forms of aiding; the accessory provides the opportunity, means or information necessary *to* commit the criminal offence. The distinguishing factor between Article 48(1) and (2) DCC is thus the temporal aspect of when the aid was provided. Nevertheless, this distinction has been watered down by a broad interpretation given by jurisprudence to the means in Article 48(2) DCC. Scholars have also criticised the distinction and have argued that the circumscription of preceding assistance no longer corresponds to the modern conception of criminal wrongdoing.[69] The Supreme Court seems to have taken the criticism to heart and has started in recent jurisprudence to pay less attention to the distinction between the two forms of assistance.[70]

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[69] H.D. Wolswijk, 'Medeplichtigheid' in J.B.J. van der Leij (ed.), Plegen en Deelnemen (Kluwer 2007), pp. 193–194.

[70] See: HR 24 March 2009, ECLI:NL:HR:2009:BG4831. See also: WODC report, Daderschap en deelneming doorgelicht, p. 47.

Concerning the actus reus of aiding, it needs to be established in regard to Article 48(1) DCC that the aid *furthered* or *facilitated* the commission of the offence[71] and in regard to Article 48(2) DCC that the aid *facilitated* or made the commission of the offence possible.[72] According to Dutch jurisprudence it is not necessary that the aid provided constitutes a *conditio sine qua non*. It is sufficient that the conduct in question furthered the commission of the offence.

The mens rea standards for aiding are comparable with those in Germany. Just like for instigation, a double intention is required. The person must (i) intend to assist the act of the perpetrator and (ii) know the essential matters that constitute the objective elements of the offence. In general dolus eventualis is sufficient.

Concerning the degree of knowledge that is required by the aider, one can safely say that a generic form of knowledge is sufficient. The aider must know the general type of crime that will be committed, but he does not have to know the details of the respective plan (of the perpetrator). A good example of this requirement is a case where the defendant had assisted three of his friends in an attempt to kill the victim. He had provided the means of transportation for finding the victim and had functioned as a driver. He did not however know the precise manner of the planned attack. In the course of the attack one of the perpetrators pulled out a gun and fired several shots at the victim. The Court of Appeal had acquitted the defendant, but the Dutch Supreme Court quashed the acquittal and held that in order for liability for assistance to arise it was not necessary for the defendant to know the precise manner of the commission of the offence, but that it was sufficient that he was generally aware of the type of crime he was assisting.[73] It follows that if a variation were to occur which affected a specific aspect of the offence that the participant wanted to assist, this may impede a conviction for assistance. For example, if John hands Peter a duplicate key to burgle his aunt's apartment, but when she catches him in the act he assaults her, John is arguably not liable for assisting Peter in the assault.

However, liability can still arise if the collateral offence was a foreseeable consequence. Dolus eventualis will make the attribution possible. A case in point is that of two brothers who were threatened by two acquaintances. Before the four met again, brother A handed B a gun and it was agreed that he should hold the two acquaintances at bay. However, the situation escalated and B killed one of the visitors. The defence argued that A had not intended the killing of the visitor, but the Supreme Court held that when handing his brother the gun he had accepted the considerable chance (dolus eventualis) that his brother would use it to kill.[74]

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[71] HR 7 April 1998, NJ 1998, 558.

[72] HR 10 June 1997, NJ 1997, 585.

[73] HR 4 March 2008, NJ 2008, 156.

[74] HR 26 February 1985, NJ 1985, 651.

5. PARTICIPATION IN ENGLAND AND WALES

5.1. INTRODUCTION

If several persons are involved in the realisation of a criminal deed, English criminal law distinguishes between primary parties, also called perpetrators or principals, and secondary parties, also called accessories or accomplices. Perpetrators are the persons who directly bring about the actus reus of the offence. Their liability is directly based on the respective definition of the criminal offence. Accomplices on the other hand 'merely' contribute to the offence committed by the perpetrator. The legal basis for accomplices for indictable offences is enshrined in the Accessories and Abettors Act 1861. Section 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977, reads as follows:

> 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any act passed or to be passed shall be liable to be tried, indicted, and punished as a principal offender.'

However, not much heed is paid to a clear demarcation of the four notions in English law and neither is the distinction between perpetrators and accomplices regarded as vital. This blurry demarcation stems on the one hand from the fact that accomplices are put on an equal footing with perpetrators and can be punished as such, i.e. each of them is deemed to be guilty of the full offence.[75] Furthermore this is compounded by the fact that judges are not obliged to state in their verdicts whether a person was found guilty as a perpetrator or as an accomplice. 'The crucial point is that the jury must be unanimous that the accused was either the principal or an accessory'.[76] In addition, it is merely required that the adduced evidence proves that the act of the defendant falls within one of the four categories.[77]

5.2. PERPETRATION

Usually the perpetrator is referred to as the one whose act is the most immediate cause of the actus reus.[78] Thus, it becomes apparent that English law distinguishes perpetrators from accomplices by resorting to the notion of directness or 'immediacy of cause'.[79] It is furthermore acknowledged in English criminal law that more than one perpetrator can be involved in the commission of the offence. Two variations are conceivable here. On the one hand it is possible that every party to the offence satisfies the required ingredients of the respective offence. Suppose for instance that A and B assault C by hitting him with clubs. If C dies from the combination of blows, they will each be guilty of manslaughter or murder.[80] Furthermore each may satisfy some part of the actus reus with the requisite mens rea and the sum of their actions adds up to fulfil the complete actus reus requirement. It is however important to stress that the perpetrator must contribute to the occurrence of the actus reus through his own act and must at least have fulfilled a part of the actus reus. If in the aforementioned example C dies due to a particular blow made by A, then B cannot be convicted as a perpetrator.[81] This line of reasoning also implies that one cannot be convicted as a principal to murder if one 'merely' restrains the victim while the other stabs them with a knife. The actus reus of murder is intentionally killing or causing grievous bodily harm to a human being and does not contain any form of restraining. Furthermore, this approach makes it impossible for the English law of complicity to regard the criminal mastermind who orchestrated, but did not participate in, the crime as a perpetrator.

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[75] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 204.

[76] R v Gianetto [1996] Crim LR 722.

[77] P. Smith, 'Strafbare Voorbereiding, Een rechtsvergelijkend onderzoek' (Boom Juridische uitgevers 2003), p. 167.

[78] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 209.

5.3. PERPETRATION THROUGH INNOCENT AGENCY

An exception to the aforementioned rule that the perpetrator must directly bring about the actus reus can be seen in the doctrine of innocent agency. If the person who actually committed the actus reus cannot be regarded as a 'participant' in the offence, because he acted without the necessary mens rea or has a defence such as infancy or insanity, the master behind the scenes who pulls the strings is regarded as the perpetrator. The person used by the puppeteer is usually termed an innocent agent. In these cases the perpetrator is the person 'whose act is the most immediate cause of the innocent agent's act'.[82] An example might clarify the matter.

George decides to kill his rich aunt Mary. He gets the poison from his friend Joey, who is aware of George's plan but has nevertheless agreed to help his friend.

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[79] K.J.M. Smith, 'A Modern Treatise on the Law of Criminal Complicity' (Clarendon Press 1991), p. 79.

[80] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 205.

[81] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 205.

[82] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 211.

A few days later George sneaks into his Aunt Mary's mansion. He pours the poison into a pot of soup which he finds boiling in the kitchen and returns home. The soup is subsequently served to Aunt Mary by her servant Julie. Aunt Mary dies instantly after the first sip of soup. In this example the servant would have acted without the necessary mens rea for murder and George would be regarded as the perpetrator.

5.4. ACCOMPLICE LIABILITY

Just like in Germany, it is generally accepted in English criminal law that the accomplice's liability is derivative from the deed of the perpetrator. However, the quality this derivative link must have is not entirely clear. The general principle in English criminal law seems to be that the perpetrator needs at least to be guilty of the offence.[83] This general principle is however subject to three limitations, namely in cases where (i) the perpetrator has a defence, (ii) the perpetrator is a minor or legally insane, and (iii) where the perpetrator lacks the requisite mens rea to be convicted of the main offence, i.e. cases of perpetration through an innocent agent. This in essence mirrors the situation in Germany in the sense that the deed of the perpetrator must at least be wrongful in order to provide a sufficient basis from which to derive liability.

5.4.1. *The actus reus of accomplice liability*

Nowadays the four forms are not strictly distinguished in English law, i.e. an extensive overlap between the four categories is possible. However, this is not considered problematic, because, as already mentioned, it is not necessary to explicitly outline the precise nature of the participation in the indictment or verdict. Leaving aside the notion of 'procuring', it is generally accepted in English criminal law that the four different notions essentially cover two different kinds of conduct, namely assistance and encouragement.[84]

5.4.1.1. Aiding

The notion of aiding is frequently interpreted to contain assisting, helping or giving support to the perpetrator.[85] Obvious examples of aiding may inter alia be supplying an instrument or tool to the principal, keeping a look out or committing preparatory acts.[86] The courts have adopted a rather broad approach to aiding and it now seems that any form of assistance given will qualify as aid.[87] Once it has been established that the conduct of the participant helped, facilitated the offence or enabled the perpetrator to commit it more easily or with greater safety, it need not be established that the aid was a *conditio sine qua non* for the principal's offence.[88] Thus, aiding does not in principle require any causal connection.[89] Furthermore, aiding does not require any consensus between the perpetrator and the accomplice.[90]

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[83] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 252.

[84] 'Participating in Crime' [LAW COM No 305], p. 29; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), pp. 214–219.

[85] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 215.

5.4.1.2. Abetting

The ordinary meaning of 'abet' is to incite, instigate or encourage.[91] As this definition overlaps with other forms of participation, its typical connotation is nowadays encouragement. Abetting generally requires that the participant did *in fact* encourage the principal in the commission of the offence.[92] This requirement distinguishes the notion from aiding, which as previously discussed can be rendered without the perpetrator's knowledge. Regarding encouragement, however, it is essential that it has been communicated successfully to the principal, as otherwise there can be no encouragement in fact.

Finally, it needs to be stressed that it is not required that the encouragement made any difference to the outcome.[93] What is important, however, is that the encouragement was rendered in circumstances where the perpetrator could have been aware of the encouragement.[94]

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[86] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 422–423.

[87] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 215. See also: R v Soloman [2009] EWCA Crim 48, where it was held that arranging for a man to attend a house where she knew that children were, violating the man's Sexual Offences Prevention Order constituted aiding and abetting.

[88] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 423–424.

[89] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 215.

[90] D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 216.

[91] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 210.

[92] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 210–212.

[93] See for instance: R v Giannetto [1997] 1 Cr App R1 where it was held that it would be sound to convict a participant of abetting murder if A had told B that he was about to kill B's (the participant's) wife and his response to this was as little as patting him on the back, nodding and saying 'oh goody'.

[94] 'Participating in Crime' [LAW COM No 305], p. 191. It is interesting to note that the Law Commission submits that the current law regarding encouragement should be interpreted to contain a rebuttable presumption of encouragement except in cases of joint criminal

5.4.1.3. Counselling

To 'counsel' means to advise or solicit or encourage. Generally counselling carries two different meanings. First, it includes the provision of advice or information, although such conduct may also be categorised as aiding and abetting. Alternatively, counselling may also encompass 'urging' someone to commit an offence. Thus it seems safe to conclude that virtually every form of advice, aid, encouragement or moral support can be regarded as abetting or counselling. Generally, counselling requires some connection between the counselling and the commission of the offence. More precisely, where the prosecution relies on counselling as the basis for secondary liability, it must establish that the commission of the offence was within the scope of the perpetrator's authority.[95] Thus, the perpetrator must be aware that he has the authority of the person counselling to do the relevant acts. In other words, an accidental commission of the envisaged offence will not amount to counselling.

5.4.1.4. Procuring

Jurisprudence has interpreted procuring to mean 'to produce by endeavour'. One procures a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.[96] In essence this amounts to bringing about the commission of an offence by another who is not an innocent agent. Here a causal link is required, because 'you cannot procure an offence unless there is a causal link between what you do and the commission of the offence'.[97] Generally procurement will take the form of persuasion, inducement or threats.[98] However, it is not necessary for the perpetrator to be aware of the procurement. A pertinent example can be found in a case where A had instructed his employee B to drive a poorly maintained tractor with a trailer close behind it. A knew that the hitching mechanism of the tractor was defective, but B was unaware of this fact. During the ride the trailer became detached, which resulted in a deadly accident with an oncoming vehicle. The court convicted A for having procured the offence committed by B by giving instructions to drive the defect vehicle.[99]

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enterprises. The underlying rationale for this seems to be forensic reasons (where violence is inflicted or sexual offending perpetrated in the presence of others, it would be a manifest nonsense to require proof that the principal were aware of the encouragement provided by each individual).

[95] See: R v Luffman [2008] EWCA Crim 1739.

[96] Attorney-General's Reference (No. 1 of 1975) [1975] 2 All ER 684.

[97] Ibid.

[98] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 213.

[99] R v Millward [1994] Crim LR 527; See also: R v Wheelhouse [1994] Crim LR 756 and Attorney-General's Reference (No. 1 of 1975) [1975] 2 All ER 684.

5.4.2. *The mens rea of accomplice liability*

The mens rea requirements for accomplices in English law are complex and authorities are contradictory; nevertheless, some general principles have emerged over time. Firstly, it is required that the secondary party must intend to assist or encourage the act of the perpetrator, or in the case of procurement, to bring the offence about; and secondly the accomplice must know the essential matters that constitute the objective elements of the offence.[100]

Although there seems to be ample authority that knowledge, in the true meaning of the word, is required,[101] the courts have adopted a broader reading of the term, covering intention, subjective recklessness and wilful blindness. An important decision on the necessary mens rea of secondary parties is *R v Bryce*.

R v Bryce [2004] EWCA Crim 1231

'*Introduction*

1 On December 17, 2002 in the Crown Court at Nottingham before Mackay J. and a jury the appellant was convicted by a majority verdict of 10 to two of murder upon count 1 of an indictment in which he appeared charged with a number of co-defendants. On January 13, 2003 he was sentenced to life imprisonment. An alternative count of assisting an offender (count 5) remained on the file under the usual terms. He appeals against conviction by leave of the single judge who granted limited leave (see further below).

[...]

3 During the early morning of October 16, 2001 X entered the Peterborough home of Patrick Moore and shot him in the head at close range as he slept in his bed. Moore was killed instantly.

4 It was the prosecution case that X was a drug runner for George Black who was a major dealer in drugs and that he was ordered by Black to kill Patrick Moore who was an associate drug dealer after an argument had developed between them on the previous day. It was alleged that the appellant, who also sold drugs for Black, was an accessory to the murder in that he had transported X and a gun with which he shot Moore to a caravan near to Moore's home so that X could wait for an opportunity to carry out the killing (count 1).

[...]

Mens rea

41 The required *mens rea* is the same for aiding, abetting counselling and procuring: see R. v Rook (1993) 97 Cr.App.R. 327 and [1993] Crim. L.R. 698 and commentary thereto. As stated in Smith & Hogan: *Criminal Law* (10th ed, 2002) at p. 145

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[100] A. Ashworth and J. Horder, 'Principles of criminal law' (Oxford University Press 2013), pp. 431–436; D. Ormerod and K. Laird, 'Smith and Hogan: Criminal Law' (Oxford University Press 2015), p. 224; A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), p. 218.

[101] See for instance: Webster [2006] EWCA Crim 415, at para 21.

"In the modern law, secondary participation almost invariably consists simply in assisting or encouraging the commission of the crime and it is generally irrelevant whether the secondary participant is present or absent or whether his assistance or encouragement was given before or at the time of the offence. The only possible exception may be the procurer who succeeds in causing the principal to commit the crime (as in the *Attorney General's Reference (No. 1 of 1975)* (1975) 61 Cr.App.R. 118) without doing anything which could be fairly described as encouragement or assistance."

42 As to (a) it is necessary to show firstly that the act which constitutes the aiding, abetting etc was done intentionally in the sense of deliberately and not accidentally and secondly that the accused knew it to be an act capable of assisting or encouraging the crime. [...]

43 As to (b), it is now well established that it is not necessary to prove that the secondary party at the time of the act of aiding, abetting etc intended the crime to be committed.

44 As Devlin J. said in National Coal Board v Gamble (1958) 42 Cr.App.R. 240 at 250:

"If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abetter."

45 Thus, if it is proved that the defendant intended to do the acts of assistance or encouragement, it is no defence that he hoped that events might intervene to prevent the crime taking place. So, where the defendant drove the perpetrator to a place where he knew that the perpetrator intended to murder a policeman, his intentional driving of the car to that place amounted to an aiding and abetting of the offence despite his unwillingness that the killing should take place: see Director of Public Prosecutions for Northern Ireland v Lynch (1975) 61 Cr.App.R. 6 at 16, [1975] A.C. 653 at 678, [...]

46 It not being necessary to show that the secondary party intended the crime to be committed by the perpetrator, what must be his state of mind *vis a vis* the commission of the crime? As was stated by Lord Goddard CJ in Johnson v Youden [1950] 1 K.B. 544 at 546:

"Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence."

[...]

47 Sir Robert Lowry C.J. in Maxwell at 140–141 stated:

"[The secondary party's] guilt springs from the fact that he contemplates the commission of one (or more) of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime shall be committed. In other words, he knows that the principal is committing or about to commit one of a number of specified illegal acts and with that knowledge helps him to do so."

48 But does the secondary party actually have to know that the crime will be committed, as this passage suggests, or is something less sufficient? Lord Simon of Glaisdale in Lynch at pp. 35 and 698–699 cited Devlin J. in National Coalboard v Gamble (1958) 42 Cr.App.R. 240, 247, [1959] 1 Q.B. 11, 20 and continued:

"The act of supply must be voluntary (in the sense I tried to define earlier in this speech), and it must be foreseen that the instrument or other object or service

> supplied *will probably (or possibly and desiredly)* be used for the commission of a crime." (Emphasis added)
>
> 49 Those words were uttered in respect of a person participating at the time of the commission of the offence by the actual perpetrator. However, in the context of a person charged as an accessory who has rendered assistance prior to the commission of the crime by the perpetrator, the circumstances in respect of which knowledge is sufficient for liability may go wider than that of the specific crime actually committed. This is because, as pointed out in *Blackstone's Criminal Practice* (2004) at A6.5 (p. 75), it is inappropriate and unworkable to require knowledge of the essential matters constituting the offence in a situation where the offence is yet to be committed in the future or by a person of whose precise intentions the accused cannot be certain in advance. It is thus sufficient for the accused to have knowledge of the type of crime in contemplation. Thus where a person supplies equipment to be used in the course of committing an offence of a particular type, he is guilty of aiding and abetting the commission of any such offence committed by the person to whom he supplies the equipment, providing that he knows the purpose to which the equipment is to be put or realises that there is a real possibility that it will be used for that purpose and the equipment is actually used for that purpose: see R. v Bullock (1954) 38 Cr.App.R. 151 and R. v Bainbridge (1959) 43 Cr.App.R. 194, [1960] 1 Q.B. 129.
>
> […]
>
> 81 Again, as already pointed out, in relation to secondary liability in respect of acts committed by an accused in anticipation of a crime, because of the uncertainty which may exist as to the precise intentions of the eventual perpetrator (whose identity may be unknown to the accessory at the time he renders his assistance) all that is necessary in the secondary party is foresight of the real possibility that an offence will be committed by the person to whom the accessory's acts of assistance are directed. […]
>
> […]
>
> 104 Accordingly, we dismiss this appeal.'

Thus the Court of Appeal held that it would be sufficient that the secondary party at the time of doing the act contemplated the commission of the offence by the principal, i.e. *he foresaw it as a real or substantial risk or real possibility*. This amounts in essence to a recklessness test. Thus the courts have interpreted knowledge as tantamount to foresight of the probable existence of the essential matters of the main offence.[102]

A further potential stumbling block in the English law on complicity is the question of what counts as an essential matter that the accomplice must foresee. The case establishing the general principle, which was also cited in

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[102] A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law - Theory and Doctrine' (Hart Publishing 2013), p. 226.

R v Bryce above, is *R v Bainbridge*.[103] In this landmark decision, A supplied oxygen cutting equipment to B who later used it to break into the Midland Bank at Stoke Newington. A claimed that although he had suspected that the equipment might be used for some illegal purpose he had not foreseen that it would be used to break into a bank. The Court held that he knew the *type of crime* that was going to be committed and that it was immaterial that A did not know the particulars of the plan.

5.4.3. *The rise and fall of parasitic accessorial liability/the doctrine of joint criminal enterprise*

Parasitic accessorial liability, sometimes also referred to as the doctrine of joint criminal enterprise (JCE) in English law, has been designed to apply to scenarios where several people set out to commit crime X, in the course of which another, unplanned crime Y is committed.[104] The doctrine emerged as a 'jack of all trades', coping inter alia with mob and gang violence, linking crimes to a multitude of actors (perpetrators and accomplices) and blaming criminal actors for collateral damage caused in the course of bringing about a common criminal plan. The genesis of the doctrine can be traced back to the landmark decision in the joined case of *R v Powell and English*, which defined the criteria for liability and shaped the contours of the JCE doctrine for many years. The question that the Supreme Court had to address in this case was whether in the case of a homicide (crime B) occurring in the course of joint criminal enterprise (of purchasing drugs – crime A) the secondary party's realisation of this possibility was sufficient to found a conviction.

The general principle that emerged from the Court's ruling was that the defendant(s) would be held liable for the collateral offence if he foresaw it as an incidence of the joint enterprise.[105] Thus, in essence, it was mere foresight of a real risk of commission of the collateral offence and participation in the joint venture with that foresight that determined the culpability of the participant.

This created a rather broad scope of liability, which especially when applied to the law of murder, which carries a mandatory sentence of life imprisonment, produced results that were widely seen as harsh and oppressive.[106]

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[103] [1960] 1 QB 129.

[104] B. Krebs, 'Joint Criminal Enterprise' The Modern Law Review (2010), pp. 584 et seq.

[105] See: R v Powell and another & R v English, House of Lords [1999] 1 AC 1. See also: A.P. Simester, J. Spencer, G.R. Sullivan and G. Virgo, 'Simester and Sullivan's Criminal Law – Theory and Doctrine' (Hart Publishing 2013), pp. 236–237.

[106] See: B. Crewe, A. Liebling, N. Padfield and G. Virgo, 'Joint enterprise: the implications of an unfair and unclear law' Criminal Law Review (2015), pp. 252–269; R. Buxton, 'Jogee: upheaval in secondary liability for murder' Criminal Law Review (2016), pp. 324–333 at p. 326.

Nevertheless, the doctrine remained part of the law for 30 years.[107] As already indicated, it came to be mostly used in situations where gang violence resulted in the death of one of the participants. The low mens rea standard of the doctrine (i.e. foresight of the commission of the offence) meant that prosecutors did not have to deal with the complex rules of aiding and abetting, or have to identify the person who struck the lethal blow, in order to charge most of the participants with murder.[108]

However, the perceived wide reach of the law led the Supreme Court to reconsider the doctrine in the joined cases of *R v Jogee* and *Ruddock v The Queen*. In this case, Jogee and a man called Hirsi behaved aggressively towards a man called Fyfe. During the night of the murder they went three times to the house where Fyfe was thought to be found. First the men resorted to threats. When they returned for a third time, Jogee stayed outside the house, striking Fyfe's car with a bottle and shouting to Hirsi, who had entered the premise, to do something to Mr Fyfe. At one point Hirsi picked up a knife from the kitchen and stabbed Fyfe to death. Both men were convicted of murder. The judge thus directed the jury that Jogee was guilty of murder if he took part in the attack on Mr Fyfe and realised that it was possible that Hirsi might use the knife with intent to cause serious harm.

The Supreme Court unanimously allowed the appeals of Jogee and Ruddock and found that the earlier case law had taken a wrong turning. Due to this, the law had deviated from the guiding principles governing the common law of complicity,[109] which had created a doctrine that was not working satisfactorily in practice and was unduly harsh.[110] Subsequently, the Supreme Court brought the doctrine of joint criminal enterprise back in line with the general rules of accessorial liability. The correct rule, so it was argued, is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage, which is the proper mental element for establishing secondary liability. Let us take a look at some of the key paragraphs from the judgment.

R v Jogee and Ruddock v The Queen [2016] UKSC 8

> '94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be

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[107] R v Jogee and Ruddock v The Queen [2016] UKSC 8, at para 3.

[108] R. Buxton, 'Jogee: upheaval in secondary liability for murder' Criminal Law Review (2016), p. 326.

[109] This argument has been attacked by those who deny that Chan Wing-Siu was an aberration. See for instance: F. Stark, 'The demise of "parasitic accessorial liability": substantive judicial law reform, not common law housekeeping' Cambridge Law Journal (2016), pp. 550–579.

[110] R v Jogee and Ruddock v The Queen [2016] UKSC 8, at paras 80–84. See also: J. Spencer 'Jogee – the "parasite" excised' Archbold Review (2016), pp. 4–5.

justified in drawing the conclusion that D2 had the necessary conditional intent[111] that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

95. In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But, as we have said, liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.

96. If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm [...] to another, and death in fact results [...] The test is objective. As the Court of Appeal held in *Reid*, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.

97. The qualification to this (recognised in *Wesley Smith, Anderson and Morris and Reid*) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

98. This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *English*. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying

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[111] The term conditional intent here must not be confused with the civil law concept of conditional intent, i.e. dolus eventualis. In English law, the term is used literally, and conditional intent accordingly occurs if a defendant only desires or needs a result to occur depending on some circumstance existing which would create that desire or need. In complicity cases, this could for instance apply if D had meant to encourage the commission of a robbery, with the conditional intent to kill anyone at the scene if this should prove necessary in order to carry out the robbery [JK].

> can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.'

Thus, the judgment brings the mental element of the secondary party back into broad parity with what is required of the principal. The mental element for accessorial liability is an intention to assist or encourage a criminal offence. Foresight will therefore no longer be sufficient for establishing liability but may simply be evidence (albeit sometimes strong evidence) of intent to assist or encourage. Thus, what once was a rule of law is now but a rule of evidence from which a jury may infer an intention to assist or encourage.

While this limitation of the law on complicity is certainly to be welcomed and brings some clarity, it is nevertheless doubtful that this decision has resolved all the problems that had troubled this area of the law.[112] It remains for instance to be seen what 'intention' really means in this context and exactly how much foresight a defendant needs to possess before the jury will be entitled to infer the necessary intent.[113]

Be that as it may, after the decision in *Jogee* the law governing secondary liability in England can now be stated with relative ease. What is required is that the defendant committed acts to encourage and/or assist the principal and knew/intended that the principal would intentionally commit the offence.[114]

6. CONCLUDING REMARKS

Having outlined the different approaches to participation in crime in Germany, the Netherlands and England and Wales it is now time to draw some comparative conclusions. It has become evident that the approach taken by the civil law systems of Germany and the Netherlands is notably different to the one adopted by the common law system of England and Wales. On first sight the modes of liability recognised in common and civil law countries seem very different indeed. The notion of instigation is for instance predominantly a civil law construct, while these forms of behaviour are generally subsumed in common law under the headings of counselling or procuring respectively.

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[112] See also: D. Ormerod and K. Laird, 'Jogee: not the end of a legal saga but the start of one?' Criminal Law Review (2016), pp. 539–552; A.P. Simester, 'Accessory liability and common unlawful purposes' Law Quarterly Review (2017), pp. 73–90.

[113] D. Ormerod and K. Laird, 'Jogee: not the end of a legal saga but the start of one?' Criminal Law Review (2016), p. 546.

[114] For a discussion of the first successful appeal post-Jogee see: B. Krebs, 'Joint enterprise, murder and substantial injustice: the first successful appeal post-Jogee' Journal of Criminal Law (2018), pp. 209–211.

In addition, the notion of perpetration seems to play a much more prominent role in civil law countries. One reason for this discrepancy is certainly the fact that the English penal system formally adheres to the equivalence theory in the context of participation in crime. As a result, the distinction between perpetrators and accomplices carries less weight in England and Wales than is historically the case in Germany and the Netherlands. In the latter two countries the distinction between primary and accomplice liability is much more important as accessories are generally eligible for a mandatory mitigation of punishment.

The equivalence theory has arguably had another important repercussion on the national doctrinal solutions regarding participation in crime. Due to the fact that in Germany and the Netherlands aiders are generally considered to take no active part in the commission of the offence itself and are furthermore eligible for a mitigation of punishment, problems arose in cases where a person did not actively participate in the commission of the offence but nevertheless played an instrumental role in planning, orchestrating, etc. the offence. The doctrinal solution found was to broaden the concept of perpetration by introducing the doctrine of hegemony over the act or functional perpetration respectively. In the English penal system such a doctrinal gimmick has never been necessary as all participants can be punished as perpetrators. This explains why English criminal law still applies a very restrictive concept of perpetration.

Another feature which has traditionally significantly shaped the law of complicity is its derivative nature. As the liability of the participant is generally derived from the wrongdoing of the perpetrator, national law had to tackle several lacunas. One predicament arises in cases where the conduct of the perpetrator is considered insufficient to constitute the basis from which liability can be derived. What if, for instance, James uses his six-year-old son to steal from shops in the neighbourhood? Traditionally these cases have been dealt with under the doctrine of perpetration by means, or innocent agency as it is called in the English penal system. Traditionally the doctrine had a very limited scope and only covered cases where the intermediary acted without mens rea or guilt, or was a minor or insane. However, while in England and the Netherlands the doctrine has largely retained its narrow scope, in Germany the scope of the doctrine has over time been significantly expanded. Perpetration by means is now also deemed to apply to cases where the intermediary can invoke a justificatory defence, even in cases where the intermediary was fully responsible for his deeds. The conceptual danger inherent in this expansion should be apparent. Perpetration by means, initially introduced to fill some gaps created by the derivate nature of accomplice liability could easily swallow the rule. Especially in a system such as Germany that considers the distinction between perpetrators and accomplices to be vital, an expansion of perpetration might blur the lines between other modes of participation in crime and in addition may introduce unwarranted seeds of collective responsibility.

A further repercussion of the derivative nature is that an accomplice who for instance provided the gun for a murder will only incur liability once the perpetrator has at least entered the attempt phase. In other words, the derivative nature of accomplice liability excludes instances of attempted aid from the scope of criminal liability. This is still the prevalent approach in Germany and the Netherlands, but recent punitive and preventive tendencies in criminal law have led to a rethinking of this approach. There seems to be a strong trend to increasingly consider the wrongdoing of accomplices to be autonomous. This has for instance in England led to the introduction of the Serious Crime Act 2007, which now also criminalises forms of attempted aid.

From the foregoing discussion it has also become evident that the subjective element of mens rea plays a vital role in the realm of participation in crime. As the liability of accomplices is in principle derived from the main offence of the perpetrator, the mental element functions as a lynchpin between the act of the perpetrator and the act of his accomplice. Furthermore, as the acts of an accomplice can be innocuous on first sight, like lending someone a screwdriver, the fault element needs to compensate for the objectively 'missing' culpable conduct. The cardinal question accordingly becomes: how closely should a person be involved in the crime's commission if (s)he is to be held liable as an accomplice?

It has been shown that the mens rea requirements for accomplice liability are largely similar in the countries considered. Succinctly put, the accomplice must intend to provide aid and must furthermore intend that the offence in question will be committed by the perpetrator. As to the required degree of knowledge, it seems common ground that the accomplice merely needs to know the main features of the offence to be committed and need not possess full and comprehensive knowledge of every detail. This seems logical, as the aider only plays a subordinate role and does not substantially influence the commission of the offence. Conversely, the knowledge required by an instigator in Germany and the Netherlands is in general slightly higher, as the instigator is effectively involved in shaping a person's intent to commit an offence.

Another area where the mens rea of the participant plays a vital role is in the context of deviations from the common plan. If several people agree to commit crime A, in the course of which a collateral offence (crime B) occurs, the question arises as to whether all participants can be deemed equally responsible for the unforeseen consequence. It is here that the criminal law is faced with the difficult task of striking a balance between the need for effective criminal rules and the principle of individual autonomy and responsibility.

The English doctrine of parasitic accessorial liability or joint criminal enterprise used to adopt a rather broad solution to the problem by making mere foresight of the commission of the offence sufficient to impose liability for the collateral offence on all participants. However, since the decision in *R v Jogee* the situation has changed and foresight can now only play an evidentiary role in establishing liability for collateral offences. This formally realigns the law of complicity in England with the situation in Germany and the Netherlands. However, it remains to be seen how juries will apply the law in future cases and how quickly they will infer intention from foresight. Still, especially in cases of escalating gang fights, murder convictions for all participants now seem more difficult to achieve. Nevertheless, where gang fights result in death, all the active participants may still be vulnerable to a manslaughter conviction, which does however give more room to judges to take the different roles and contributions of participants into consideration at the sentencing stage.[115]

The Dutch approach seems quite broad in this context where a pragmatic solution was sought and the notion of dolus eventualis is often used to impose liability for collateral offences. As crime is by definition a risky business, it often seems easy enough to conclude that someone foresaw the considerable risk of a collateral offence occurring and accepted it. In addition, it is, as established in a recent Supreme Court judgement, also possible to derive liability for the collateral offence from the fact that the partners in crime had cooperated closely in the commission of the prior crime A, if the risk of commission of the collateral offence B seems inherent in crime A.

The German approach seems to be the most restrictive in this context, as generally only deviations that were covered by a participant's intentions can be attributed. Mere foresight of the commission of the collateral offence seems to be insufficient in German law. Yet within certain strict limits, jurisprudence in Germany has also accepted that offences that could reasonably be expected to occur in the course of another criminal enterprise can also be attributed to other participants.

Finally, similar problems can arise within the civil law construct of instigation. Based on the general mens rea requirements, outlined above, it has become evident that minor deviations will usually be covered by the broad notion of dolus eventualis. Matters are however different once the perpetrator commits an entirely different offence than the one induced by the instigator. The pivotal question will therefore become whether the offence committed is fundamentally different to the one induced. This may however not always be easy to determine. It is clear that fraud is different to rape or arson; but is fraud also fundamentally different from theft or is theft fundamentally different from robbery? This may already indicate the difficulty of the predicament at hand here and perhaps shows that it will be nearly impossible to solve it in an abstract manner. Rather, it should be dealt with on a case-by-case basis, allowing the judge to take into consideration all the circumstances and peculiarities of the case at hand.

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[115] D. Ormerod and K. Laird, 'Jogee: not the end of a legal saga but the start of one?' Criminal Law Review (2016), p. 332.

The developments in the law of complicity have certainly not come to an end. With the latest increase in organised crime, scholars and politicians alike will continue to strive for improvements in this area of the law. The cardinal issue will thus arguably be striking a fair balance between the fundamental notion of individual responsibility and the need to effectively tackle and sanction collective criminal efforts.

CHAPTER XI
CORPORATE CRIMINAL LIABILITY

David Roef

1. INTRODUCTION

Criminal offences may not only be committed by individual human beings (natural persons), but also by corporations (legal persons).[1] The actions of corporations have far-reaching consequences for society. Cases of legal persons, private and public, that have been shown to be irresponsible or unethical are legion. The media regularly report on companies and governmental agencies that have failed in their obligations to keep employees and the public at large safe from physical harm, financial jeopardy and environmental pollution. Recent cases like the disaster of the Deepwater Horizon oil spill, the Volkswagen emissions scandal and the tragic event of the Grenfell Tower fire in London are telling examples of the complex nature and seriousness of corporate wrongdoing.

Given the ubiquitous role of legal persons in our modern society, there are several reasons why corporate criminal liability should exist. First, it seems consistent with the whole notion of corporate legal personality; that is, of viewing a corporation as a legal entity separate from its employees and shareholders. If we accept that companies have all the rights and benefits of legal personality in the context of civil law, in terms of property ownership, making contracts and suing others, it is difficult to maintain the position that this personality should not also be subject to the rules of criminal law.[2]

Second, it can be argued that the general objectives of criminal law are of course also applicable to corporate crime. There is no reason why the expressive aims of retributive justice and utilitarian goals, like general deterrence, would no longer be reasonable justifications for punishment when we hold legal persons liable, as long as we take into account the specific nature of corporate blameworthiness and the criminogenic causes behind corporate wrongdoing. Whether an individual businessman or an oil company commits tax fraud, whether a patient's death is the result of the actions of an incompetent nurse or the hospital's mismanagement, the rationale of punishment can be motivated by similar reasons. Of course, corporations cannot be put in prison, but a range of alternative sanctions can still be applied. As well as financial sanctions, these may include forfeiture of illegal profits, the obligation to repair certain damage caused by the corporate wrongdoing (e.g. environmental pollution), prohibition on participating in public tenders, and prohibition on certain economic activities.[3] Fines and negative publicity related to a conviction of a legal entity may act as a specific deterrent against acting illegally. Corporate criminal liability may therefore discourage other companies from disobeying the law – for example, if a company is convicted for a violation of safety rules that resulted in the death of an employee, this may encourage other companies to invest more in their own safety systems.

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[1] In this chapter we use 'corporation', 'legal person' and 'legal entity' as synonyms, being very well aware that some of these terms may be used with a different meaning.

[2] N. Cavey and C.E. Kelly, 'Corporate Criminal Liability and the Companies Act 2014: A Covert Step towards Re-conceptualisation and Reform' King's Inns Law Review (2015), p. 56.

Third, without corporate criminal liability there would be a risk of only a few individuals being prosecuted for offences that were in reality caused by corporate policies and practices that transcend individual actions, even when the latter can be considered in themselves to be criminal offences. Arguably, criminal liability of legal persons may therefore allow for a more differentiated and fairer distribution of justice when crimes are committed in a definite corporate setting, especially when the blame cannot be put solely on specific individuals, but refers more to a kind of culpable corporate culture. One has to keep in mind that employees may violate the law mainly because the whole corporate organisation has furthered or condoned illegal activities; for example, the workload in a transportation firm may be so demanding that an overtired driver causes a lethal traffic accident. Would we consider it a fair application of criminal justice if only this individual driver were to be held liable for negligent manslaughter, or should we also take a closer look into the corporate structure and culture itself and see whether this may have contributed to the criminal offence?

Last but not least, if through an illegal practice a company enjoys a financial or other economic benefit like a better market position, it stands to reason that the legal entity should be the one to pay the price, and not the employees who have contributed to the commission of the offence.

In this chapter, different European approaches to corporate liability will be discussed. It is important to note here that although corporate criminal liability is at present an established concept in most Western legal systems, this has not always been the case. For a very long time, many European jurisdictions had no provisions on the criminal liability of legal entities, and some, like Germany and Sweden, still do not. But in recent years, France, Belgium, Austria, Italy and Spain – to name but a few – have introduced or expanded criminal liability for corporations.[4]

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[3] See for an overview of possible sanctions that can be imposed on legal persons within the penal systems of EU Member States: G Vermeulen, W. De Bondt and C. Rykman, 'Liability of legal persons for offences in the EU' (Maklu 2012), pp. 85–90.

2. APPROACHES TO CORPORATE WRONGDOING: A CONCEPTUAL OVERVIEW

Regarding the question of whether and how legal entities should be held criminally liable, each country has to address the same fundamental challenges. Foremost among these challenges is the difficulty of drawing a complete analogy between the criminal liability of legal entities and that of human beings. The whole field of criminal law is traditionally designed for natural persons, as only individuals can act, so it is argued, and only human beings are considered to be morally blameworthy. Is corporate criminal liability not by definition problematic, as highly individualistic concepts, like the voluntary act requirement and different forms of mens rea, were never meant to be applied to corporate actors in the first place? How can we hold corporations liable if they have, to quote the famous words of the British statesman Edward, first Baron of Thurlow, 'neither bodies to be punished, nor souls to be condemned'?[5]

In comparing different legal systems we may find two main conceptual approaches or models to tackle corporate wrongdoing. Each model reflects a certain policy choice with regard to the following conceptual dichotomy: should a corporation be perceived as nothing more than a legal fiction, composed of real human beings, or is a corporation in itself an organisational social reality, capable of acting quite independently of its individual members? As we will see subsequently, the answer to this question determines to a large extent the modus operandi of concrete forms of corporate liability. It should, however, be stressed that the distinction between these two approaches primarily serves a theoretical and analytical function that allows us to identify and critically assess some specific corporate liability systems. We will see that in practice the two models are not necessarily mutually exclusive, and that some legal systems have developed an approach that tries to combine elements of both models.[6] In fact, it may even be misleading to think that there is only one ideal foundational theory for corporate liability. The search for such an all-encompassing theory may blind us to the intrinsic diversity of corporate wrongdoing, depending on factors such as the structure and scale of the corporation and the type of offence in question.

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[4] G. Vermeulen, W. De Bondt and C. Ryckman, 'Liability of legal persons for offences in the EU' (Maklu 2012), p. 34.

[5] Quoted in J. Poynder, 'Literary Extracts' (1844), p. 268. This is often misquoted as 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?'.

[6] M. Hornman and E. Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate Mens Rea' in F. de Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M. Koenraadt, F.G.H. Kristen, D. Rozenblit and E. Sikkema (eds.), Overarching views of delinquency and deviancy (Gouda Quint 2015), p. 292.

2.1. THE NOMINALIST APPROACH

The first, and also the oldest, model is the so-called nominalist or atomistic approach, which establishes a derivative liability of the corporation. According to this model a legal entity is only what its name already implies, i.e. a legal fiction (hence the term nominalist); a corporation should therefore only be looked upon as a collectivity of individuals, the mere sum of its human parts (hence the term atomistic). This means that criminal liability of the legal person is necessarily derived from individual wrongdoing. A nominalist approach implies a very traditional anthropomorphic view of corporate personality, which can be illustrated in two ways. First it may be called anthropomorphic because it reduces a corporation to human beings, and corporative wrongdoing to their individual decisions and conduct. But it is also anthropomorphic in a more metaphorical sense, in that it views corporate personality itself as similar to the personality of a human being; the individual officers, managers or board of directors are then seen as representing the heart and brain of the corporation, and the employees its hands and feet. The individuals that make up the legal person constitute different organs of the body corporate. And just like a human being can only will and act through its organs, a legal person wills and acts through its managers and other personnel. This line of thinking can be summarised in the catchphrase 'corporations don't commit crimes; people do.'[7] Criminal liability of a legal entity consequently consists in attributing the actus reus (act or omission respectively) and the mens rea of a natural person to the legal person. However, there seems to be an important downside to this form of attribution: if there is no identifiable or sufficient degree of individual responsibility, there can be no corporate liability either.[8] The main challenge in this approach is of course whether highly individualised criminal law concepts can always be so easily transferred to a legal entity – for example, does the attribution of fault (intent, negligence) of an individual officer to a company really capture the true nature and genesis of corporate wrongdoing? To stretch the metaphor a little bit further: if human beings are already more than their organs, why then not legal persons? As we will see later, most legal systems originally adopted a derivative form of corporate liability, and any later statutory or judicial reforms can be understood as remedial responses to various drawbacks of this nominalist approach.

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[7] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 5.

[8] J. Gobert, 'The evolving legal test of corporate criminal liability' in J. Minkes et al. (eds.), Corporate and White-collar Crime (Sage 2008), p. 68.

2.2. THE ORGANISATIONAL APPROACH

The second model is the exact opposite of a derivative view of corporate liability, and is called the realist or organisational approach, which looks upon corporate personality as something more than, and different from, only the sum of its parts. Rather than viewing a legal entity as only a collectivity of individuals, this model embodies the idea that a corporation is in itself a dynamic organisational reality (hence the term realist), capable of acting independently from its individuals. This means that legal entities may act and be at fault in ways that are different from the ways in which their human members can act and be at fault. In fact, corporations may influence and shape the conduct of their members in a way that the members might not have chosen or accepted outside of the organisational context.[9] In order to hold a corporation liable it is therefore no longer necessary to first locate the actus reus and mens rea of an individual who acted on behalf of the legal entity; these elements should be based on the organic or organisational reality of the corporation itself. In fact, one may even argue that the traditional dichotomy between actus reus and mens rea is already in itself ill-equipped to capture corporate wrongdoing. As this dichotomy has its origin in a dualistic view of human conduct, traditionally understood as an interaction between body and mind, it is doubtful whether such a distinction is still workable when one replaces an anthropomorphic approach to corporate wrongdoing with an organisational one. While for common crimes committed by natural persons a strong distinction between the two elements makes sense, it is much closer to corporate reality to base liability on the sole notion of corporate blameworthiness.[10] If we look at the standard cases of corporate misconduct, it is obvious that these consist primarily of crimes of omission. Given the irrelevance of physical conduct in such cases, and the objective character of the required negligence for violations of a duty of care, a clear division between actus reus and mens rea seems less important. In other words, the specific nature of most corporate offences already provides a compelling argument for adopting a realistic approach that is less restricted by orthodox doctrinal concerns.

An additional, perhaps rather surprising reason for recognising a corporation as a real morally responsible agent in itself is because this is how it is actually perceived by the public.[11] It is interesting to note that recent discoveries in social psychology and cognitive science increasingly show that when groups show high levels of coherence, as do most corporations, humans perceive them as possessing many of the properties and mental states traditionally belonging to individuals.[12] This also means that we are naturally disposed to apply notions of intentionality and blameworthiness to the corporations themselves rather than limiting these to their members. The social practice of blaming groups like corporations is therefore not that different from blaming individuals. Both mechanisms attribute responsibility by drawing inferences of intent and culpability from observed behaviour and contextual circumstances.[13]

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[9] M. Wilkinson, 'Corporate criminal liability – The move towards recognising genuine corporate fault' Canterbury Law Review (2003), p. 165; E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 24.

[10] See also: J. Keiler, '*Actus reus* and participation in European criminal law' (Intesentia 2013), p. 441.

[11] M. Wilkinson, 'Corporate criminal liability – The move towards recognising genuine corporate fault' Canterbury Law Review (2003), p. 166.

The most important challenge for any realistic model is of course how corporate wrongdoing can be defined in such a way that it respects the protective value of the guilt principle and therefore genuinely incorporates organisational fault and culpability. For example, how can we attribute certain subjective elements or mental states to corporations without automatically resorting to individual fault? What do these traditional concepts even mean if they are no longer derived from human beings? Over the past decades several proposals have been developed to establish corporate fault. It would go beyond the purpose and scope of this chapter to even try to summarise the wealth of literature written on this issue. However, what all the proposals seem to have in common is locating the corporate mens rea directly in the corporation's decision-making processes, policies, institutionalised practices and culture. Some theories focus primarily on the presence of a so-called proactive corporate fault, that is, the failure of the corporation's practices and procedures to take the necessary precautions to prevent the commission of a crime.[14] In contrast, others have proposed a reactive fault model that shifts the focus of liability from fault prior to the time of the offence to fault at the time of the offence, that is, the failure to undertake adequate preventive and corrective measures in reaction to the discovery of the offence.[15] This means that liability would be based on what the corporation did not do to correct the wrongdoing. Arguably, both forms of corporate fault seem to be most appropriate for crimes of negligence constituting a violation of a duty of care.

For offences involving more subjective mental states, such as recklessness and intent, it is argued that corporate policy and culture may offer a solid basis for corporate liability. For example, Colvin suggests that intent can be deduced from a set of policies, rules and practices, formal as well as informal.[16] In order to establish that a corporation committed an offence 'intentionally' in the sense of 'purposefully', one has to prove that it was the corporate policy to commit the offence. And in order to prove a distinctive corporate form of recklessness, it is proposed that the corporate culture must have favoured the commission of offences.[17]

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[12] M.E. Diamantis, 'Corporate Criminal Minds' Notre Dame Law Review (2016), p. 2078.

[13] M.E. Diamantis, 'Corporate Criminal Minds' Notre Dame Law Review (2016), p. 2079.

[14] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 25.

[15] B. Fisse and J. Braithwaite, 'The allocation of responsibility for corporate crime: Individualism, Collectivism and Accountability' Sydney Law Review (1988), pp. 505–506; B. Fisse, 'Corporate Criminal Responsibility' Criminal Law Journal (1991), pp. 173–174.

[16] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 33.

That such ideas are not just limited to mere theoretical exercises can be illustrated by briefly referring to the Australian system. Of all the common law jurisdictions, Australia not only uses a traditional derivative form of corporate liability, but has also explicitly adopted an alternative realist approach.[18] Section 12.3(1) of the Australian Criminal Code (ACC) starts by stating that intention, knowledge or recklessness will be attributed to a corporation that 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'. Subsequently, the ACC offers two methods by which such authorisation or permission can be established. The first one is clearly nominalist, as it is based on proof that the 'board of directors' or a 'high managerial agent' intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence. Next, section 12.3(2)(c) and (d) ACC provides an alternative method by stating that the corporation will be taken to have authorised or permitted the commission of an offence if is proved that either a 'corporate culture' existed which directed, encouraged, tolerated or led to non-compliance, or that the corporation failed to create and maintain a 'corporate culture' that required compliance (with the relevant provision). In section 12.3(6) corporate culture is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate in which the relevant activities take place.' This concept of corporate culture clearly moves away from a more or less isolated individual fault by focusing on blameworthiness at an organisational level.[19] Within Europe, however, such an explicit realist model is as yet non-existent, although there are some moderate developments in that direction, as will be shown below.

2.3. THE ALTERNATIVE APPROACH OF ADMINISTRATIVE LIABILITY

Apart from these genuine criminal liability models, a third and final way of dealing with corporate wrongdoing may be called the alternative administrative approach and is arguably the result of the orthodox view that criminal law should only be applied to human beings, and not to corporations. This means that corporate offences are to be dealt with primarily outside of criminal law by making legal entities subject to an alternative system of administrative (or even civil) liability.[20] As will be explained later, this administrative liability system is precisely the model used in Germany, where legal entities are considered to lack the capacity to act in a blameworthy way (in Latin: *societas delinquere non potest*). However, even within such an administrative liability system the question still remains to be answered as to when a legal entity is considered to be liable, and which model (be it nominalist or realist) forms the theoretical foundation for sanctioning the corporation.

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[17] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 38.

[18] See for a good summary of the Australian system: J. Kyriakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' Netherlands International Law Review (2009), p. 339; M. Pieth and R. Ivory (eds.), 'Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice 9' (Springer 2011), p. 97.

[19] M. Wilkinson, 'Corporate criminal liability – The move towards recognising genuine corporate fault' Canterbury Law Review (2003), p. 165.

It is also important to remember that the label 'administrative' sanctions should not mislead us into thinking that this system is less punitive than traditional criminal law approaches. Administrative penalties can be quite substantial and often have the same communicative and deterrent function as criminal sanctions. Accordingly, the ECtHR has held that the (national) label attached to a law is irrelevant for the application of Article 6 of the Convention, as the criminal nature of a nominally administrative sanction can be deduced from the general character of the rule and the purpose of the sanction, which are definitely deterrent and punitive.[21]

2.4. CONCURRING LIABILITY OF INDIVIDUALS

Another critical issue is the relationship between corporate liability and the individual liability of natural persons for the same or a related offence. One could argue that in cases where the liability of the legal person can be successfully established, a concurrent individual liability is no longer an appropriate way to address the corporate wrongdoing. It may even be the case that the natural person concerned committed the offence due to corporate pressure fostering criminal conduct. However, this kind of reasoning loses sight of the important fact that the legal entity and the natural person are relatively independent agents acting within their own sphere of competency and moral and social responsibility. In short, corporate and individual liability should not be understood as competing strategies, but as complementary approaches to fighting corporate crime. This prevents natural persons from hiding their own role in the corporate misconduct behind the so-called 'criminal corporate veil', which allows them to avoid criminal charges by scapegoating the legal entity and its organisational culture.[22]

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[20] See for an overview of European systems using a form of administrative liability: G. Vermeulen, W. De Bondt and C. Rykman, 'Liability of legal persons for offences in the EU' (Maklu 2012), pp. 31–35.

[21] See: Öztürk v Germany, Appl. No. 8544/79, 21 February 1984. See also: Sergey Zolotukhin v Russia, Appl. No. 14939/03, 10 February 2009.

[22] J.M. Punch, 'Rethinking Corporate Crime' (Cambridge University Press 2003), p. 50.

On the other hand, the situation should also be avoided where only one or a select few individuals are blamed for the existence and continuation of criminogenic practices that are evidently of a more collective and structural nature. Consequently, it is therefore good to see that most legal systems still allow for the possibility of holding corporate officers and employees liable if they themselves have committed an offence, or when they can be considered to be a participant in the corporate offence. Corporate responsibility does not automatically negate the responsibility of natural persons, even when the latter are acting on behalf of their organisation. The Dutch system even explicitly mentions the possibility of prosecuting both the corporation and the leading natural person (*feitelijk leidinggever*) within the organisation for the same criminal offence if the natural person had the capacity to control and also accepted the illegal actions (Article 51(2) DCC).[23]

In conclusion, a system where criminal or administrative corporate liability exists in combination with a system of individual criminal liability for corporate officers should therefore not be confused with systems that do not accept any corporate liability at all (be it criminal or administrative), and where liability for corporate wrongdoing can inevitably only be attributed to natural persons. This was for example the case in France and Belgium, before these countries accepted corporate liability into their criminal codes (in 1994 and 1999 respectively), and where an attribution in this direction was the only way in which acts of legal entities could be punished indirectly. Arguably, this impossibility of holding legal entities liable themselves lead to systematic impunity for corporate wrongdoing, and not infrequently to unfair prosecution of corporate personnel.[24]

Let us now have a closer look at these different theoretical approaches in a more comparative way, which allows us to illustrate how these models may operate in practice. As will become clear, some European systems favour a nominalist model, while others have developed a more realistic or mixed approach, using different models depending on the nature of the offence.

3. CORPORATE LIABILITY IN ENGLAND AND WALES

In England and Wales the judicial practice developed two main doctrines of derivative corporate criminal liability applying to different kinds of offences: the doctrine of vicarious liability and the identification doctrine. In short, vicarious liability applies mainly to regulatory offences, many of which are strict liability offences that do not require any proof of a mental state, while the identification doctrine is typically used for non-regulatory offences demanding proof of fault.[25] In the past decade, several shortcomings of these traditional doctrines have resulted in new legislation that has revolutionised to a certain extent English corporate criminal law. The main turning point was the Corporate Manslaughter and Corporate Homicide Act in 2007, and the Bribery Act in 2010, followed by the Criminal Finance Act in 2017.

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[23] J. de Hullu, 'Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015) pp. 476–484.

[24] D. Roef, 'Strafbare overheden. Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring' (Intersentia 2001), pp. 316–343; D. Pacquee, 'De "strafrechtspersoon": bespiegelingen omtrent het moreel element in de wet strafrechtelijke verantwoordelijkheid van rechtspersonen' Jura Falconis (2007–2009), pp. 477–504.

3.1. THE DOCTRINE OF VICARIOUS LIABILITY

The doctrine of vicarious liability (also called the *respondet superior* theory) originally emerged in the law of torts in the 19th century, and clearly takes a nominalist approach to corporate wrongdoing. It constitutes a peculiarity of common law which is as such not accepted in the civil law systems of Germany and the Netherlands. Vicarious liability opts for a form of criminal liability that is equivalent to the rule in the law of torts that an employer is liable for the acts of any employee or agent. Based on the maxim *qui facit per alium facit per se* (he who acts through another acts through himself), the doctrine of vicarious liability holds that one person can be held responsible for the acts of another person as if they were his own acts.[26] Consequently, a legal entity can also be held vicariously liable for the acts of all its officers, employees, and agents, just like a natural person (employer, principal) would be liable in these circumstances.[27]

There are, generally speaking, three situations where vicarious liability plays an important role:

1. Where some statutory offences explicitly or implicitly impose the possibility of vicarious liability.[28] A good example is section 64(5) of the 1988 Road Traffic Offenders Act, which provides that the owner of a vehicle (which can also be a legal person) shall be presumed to have been the driver at the time of the commission of certain offences, and 'accordingly, that acts and omissions of the driver of the vehicle at the time were his acts or omissions.'
2. In strict liability offences where courts have allowed the statutory offence description of the actus reus to be interpreted in such a way that someone

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[25] C. Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in M. Pieth and R. Ivory (eds.), Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice 9 (Springer 2011), p. 97.

[26] G.P. Fletcher, 'Basic Concepts of Criminal Law' (Oxford University Press 1998), p. 190.

[27] D. Ormerod, 'Smith and Hogan: Criminal Law' (Oxford University Press 2008), p. 248.

[28] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 8.

other than the actual perpetrator can also be seen as the person who committed the offence. Vicarious liability is here based upon mere attribution. This often applies to corporations in their capacity as employers or principals. Strict liability offences usually contain verbs such as 'sell', 'possess', 'permit' and 'use' that allow for an interpretation whereby not only the employee but also the employer realises the actus reus. An example might be where a shop assistant is the one who is actually selling the food, but where as a matter of ordinary language we would say that the employer is really the one who is selling it, and who subsequently may be held liable if, for example, certain health regulations are violated.[29]

3. In cases where a statute imposes vicarious liability on the owner, licensee or keeper of property (e.g. premises) for the conduct of any person to whom statutory duties (e.g. management of the premises) have been delegated. This is vicarious liability according to the delegation principle.[30]

According to the vicarious liability doctrine the individual's conduct is attributed to the corporation in a two-step process. First, it needs to be established whether the conduct of the individual fulfils all the elements enshrined in the underlying offence. Once this has been established, the liability of the individual is copied and attributed to the corporation, based on the legal relationship between the corporation and the individual, i.e. agency or employment. This attribution is based on the legal fiction that the conduct of the individual is the conduct of the corporation.[31] It does not matter whether the individual employee or agent is a senior officer or occupies a lower position within the organisation. Thus, the doctrine embodies a purely derivative approach to corporate liability and sidesteps the problem of proving a corporate actus reus and mens rea by simply declaring it irrelevant.

Arguably, this form of attribution has several shortcomings. The biggest drawback in establishing corporate liability is its necessary link to individual liability. As a legal person can only be liable through the criminal liability of some individual employee or agent, corporate liability cannot arise if no individual liability can be established. This presents problems of proof to prosecutors as it may often be clear that a criminal wrong has occurred, but not always be equally clear who has actually committed the offence.[32] Another criticism is that vicarious corporate liability is both under-inclusive and over-inclusive.[33] It is under-inclusive because it only establishes corporate liability when there is some individual who is criminally liable. If no individual can be found, there can be no corporate liability either, even when it is quite clear that the organisational culture as such is to blame for the commission of the offence. On the other hand, vicarious liability is also over-inclusive because it makes it possible to attribute to the corporation *any* conduct of *any* employee operating on behalf of the corporation. As long as it can be proven that an individual has committed a criminal offence, the corporation will be held liable, even in the absence of corporate fault.[34] It could be argued that this contradicts the criminal law principle of *nulla poena sine culpa*, which prohibits punishing a person without any proof of one's own blameworthiness. If individual criminal law demands that natural persons be punished only if they acted in a blameworthy way, then corporate criminal law should demand the same from legal persons.[35]

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[29] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 212.

[30] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), pp. 210–211.

[31] E. Lederman, 'Models for or Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' Buffalo Criminal Law Review (2000), p. 652.

[32] J. Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), pp. 78–81.

3.2. QUALIFIED VICARIOUS LIABILITY: THE BRIBERY ACT 2010 AND THE CRIMINAL FINANCE ACT 2017

To resolve some of the limitations of traditional vicarious liability, especially its non-applicability to certain mens rea offences regulating financial crime, the UK government has recently created some corporate crimes that hold the organisation liable for 'failure to prevent offences' that are committed on behalf of the organisation. These new corporate crimes use an upgraded 'milder' version of vicarious liability, making this doctrine easier to apply to offences that require an element of fault.

In order to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, England enacted the Bribery Act in 2010. This Act not only reforms the existing bribery offences, but also imposes strict liability on corporations for failure to prevent bribery committed by anyone associated with them, like employees, agents or subsidiaries. Section 7 of the Bribery Act 2010 provides:

> '(1) A relevant commercial organization ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending –
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.

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[33] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 8.

[34] J. Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), p. 62.

[35] C.G.-J. Diez, 'Corporate culpability as a limit to the overcriminalization of corporate criminal liability: the interplay between self-regulation, corporate compliance, and corporate citizenship' New Criminal Law Review (2011), pp. 95–96.

> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.'

In essence, the Bribery Act 2010 implements a *qualified* form of the vicarious model.[36] It is obviously vicarious as the corporation is objectively held liable for the acts of its employees and agents, but it is qualified as its broad scope is circumscribed by a due diligence defence if the organisation can prove that it had in place adequate procedures to prevent the bribery. To be sure, the intent of the person who actually commits the bribery offence must still be proven.[37] But if we assume that this is the case, which may still be a hurdle in itself, the burden of proof is then transferred to the corporation. The company will be guilty unless it can prove that it implemented adequate procedures to prevent the conduct. After some debate about the precise content and scope of such preventive procedures, the Ministry of Justice published a document incorporating some guidance principles. For example, the procedures implemented must be proportionate to the bribery risks, and they have to be embedded throughout the whole organisation, through internal and external communication, training programmes, monitoring and reviewing mechanisms.[38]

Bribery is the first 'proper' non-regulatory offence, which requires proof of intention or knowledge, to have a strict form of corporate liability.[39] In serving as an effective tool for combating bribery, the Act changes the basis for corporate liability from focusing on the personnel within the organisation to focusing on the quality of the system governing the activities of the organisation.[40] With the creation of this failure-to-prevent provision, which requires no mental state, there is also no need to identify the controlling mind (senior officers) of the corporation, which can be quite problematic, as we will see later, in applying the doctrine of identification. As bribery generally happens in the lower hierarchy of corporations, this failure-to-prevent offence is considered to be much more effective. On the other hand, there is also no need to prove corporate fault, which is necessary in a realistic approach, as the burden of proof (of due diligence) now rests solely with the corporation.

Largely inspired by the Bribery Act 2010, the UK government recently took the decisive step of also applying qualified vicarious liability to tax evasion. The Criminal Finance Act 2017 created strict liability offences that seek to hold corporations criminally liable for facilitation of tax evasion. According to sections 45–46 of the Act, a corporation is guilty of the offence where it fails to prevent a person associated with it from criminally facilitating a UK tax evasion or a foreign tax evasion.[41] As in the Bribery Act 2010, the liability is strict; the senior management is not required to have any intent or knowledge of the tax evasion. This is a drastic change from the existing law, under which corporations could only be held liable for facilitating tax evasion if the senior members of the organisation were aware of the facilitation. However, section 45(2) again allows for a due diligence defence if the organisation had reasonable prevention procedures or if it was not reasonable in all the circumstances to have any prevention procedures in place.

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[36] C. Wells, 'Corporate criminal liability: a ten year review' Criminal Law Review (2014), p. 865.

[37] C. Wells, 'Corporate criminal liability: a ten year review' Criminal Law Review (2014), p. 865.

[38] Guidance to help commercial organisations prevent bribery: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[39] C. Wells, 'Corporate Criminal Liability in England and Wales: Past, Present, and Future' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), p. 107.

[40] J. Mukwiri, 'British law on corporate bribery' Journal of Financial Crime (2015), pp. 16–27.

On the face of it, the Bribery Act 2010 and the Criminal Finance Act 2017 use a purely nominalist approach, as the corporation is held vicariously liable for the conduct of its employees or agents. However, the due diligence defence gives the organisation the opportunity to avoid liability, which means that courts will have to look at corporate policies and practices that have been implemented to prevent the offences. By means of this defence the organisational culture, in particular the effectiveness of corporate compliance mechanisms, should become quite important for assessing criminal liability, although the onus lies with the corporation.[42]

3.3. THE IDENTIFICATION DOCTRINE

Historically, the identification doctrine (also called the alter ego theory) was intended to counter the drawbacks of vicarious liability, as this doctrine is not (in its original strict form) applicable to mens rea offences. It is definitely the most widely used nominalist approach to corporate wrongdoing, not only in England and Wales, but in many other legal systems, and like all forms of derivative corporate liability, this theory is based on a strict anthropomorphic view of corporations. The corporation is seen as a collectivity of human beings and is identified through its legal organs or other natural persons.[43] Accordingly, the English courts have developed this doctrine of corporate liability for mens rea offences that allows certain senior people within a corporation, usually company directors, to be *identified* with the company. Under this identification doctrine the acts and mental state of a certain corporate officer – the directing mind of the corporation – are deemed to be the acts and mental state of the corporation.

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[41] Sections 45–46 Corporate Finances Act 2017.

[42] One could also say that both Acts use a so-called pro-active or preventive-fault model of corporate culpability, as it grounds liability on a failure to implement an adequate internal system of controls to prevent the commission of an offence. See also: C. De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' Washington University Global Studies Law Review (2005), p. 559.

[43] C. Kelk (bewerkt door F. de Jong), 'Studieboek materieel strafrecht' (2013), pp. 506–507.

A major difference with the vicarious liability doctrine is that the behaviour and mental state of certain individuals, endowed with certain responsibilities, may be identified as the actions and mental states of the legal entity itself. It is therefore more than a mere technical attribution of an individual's conduct to the corporation. In the identification model the key personnel are assimilated with the legal entity and are therefore considered to be acting *as* the corporation itself rather than on behalf of it.[44]

3.3.1. *The directing mind and will*

The landmark decision that established the doctrine in the English legal system is *Tesco Supermarkets v Nattrass* (1972) where the House of Lords adopted a rather narrow view of who could be identified with the company as the 'controlling mind'. In this case, Tesco were charged with a mens rea offence under the Trade Descriptions Act 1986.[45] The company had advertised that they were selling a particular soap powder at a reduced price. A customer had tried to buy a packet at the advertised price, but they had refused to sell it at his local branch as all the packets were marked at the full price. It appeared that the failure to display the goods at the reduced price was the fault of the branch manager, so the issue in the case was whether he could be considered to be representing the company by his acts. The House of Lords decided that Tesco's Board of Directors exercised strict controls over its branch managers, allowing them no control over pricing policy, and therefore the branch manager could not be identified as the corporation. Here are some leading statements of Lord Reid, also referring to some older cases that illustrate the identification doctrine:

> **Tesco Supermarkets Ltd v Nattrass [1972] AC 153**
>
> 'I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. [...] He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or

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[44] G. Vermeulen, W. De Bondt and C. Ryckman, 'Liability of legal persons for offences in the EU' (Maklu 2012), p. 59.

[45] C. Elliot and F. Quin, 'Criminal Law' (Pearson Education Limited 2010), pp. 309–310.

merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability. […]

Reference is frequently made to the judgment of Lord Denning in Bolton (Engineering) Co. v. Graham [1957] 1 Q-B. 159. He said (at page 172): "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such." In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who "represent the directing mind and will of the company", and "control what it does." I think that is right for this reason. Normally the Board of Directors, the Managing Director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the Board of Directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. Lennard's case was one of them. […]

In Henshall v. Harvey [1965] 2 Q.B. 233 a company was held not criminally responsible for the negligence of a servant in charge of a weighbridge. In Magna Plant v. Mithell (unreported) 27th April 1966 the fault was that of a depot engineer and again the company was held not criminally responsible. I think these decisions were right. In the Magna Plant case Lord Parker, L.C.J., said: "[…] knowledge of a servant cannot be imputed to the Company unless he is a servant or whose actions the Company are criminally responsible, and as the cases show, that only arises in the case of a company where one is considering the acts of responsible officers forming the brain […]"

[…] I have said that a Board of Directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the Board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also to take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.'

Although this restricted identification liability has been challenged by (a non-binding) judgment of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995), a more flexible approach has not been accepted in later case law. Illustrative is the case following the Southall train crash in 1997, in which seven people were killed. In *Attorney-General's Reference (No. 2)* (1999) the Court of Appeal decided that a non-human agent cannot be convicted of the crime of gross negligence manslaughter in the absence of evidence establishing the guilt of an identified human individual for the same crime. Because of this common law requirement to identify a directing mind, and following considerable criticism of such a narrow application of the identification doctrine, the Corporate Manslaughter and Corporate Homicide Act 2007 was passed. As will be discussed below, this Act departs from a narrow identification liability and can be seen as a step forward in the direction of a more realistic approach.

3.3.2. *Shortcomings of the identification doctrine*

We have already mentioned that a major challenge of a nominalist approach is whether holding legal persons liable solely on the basis of individual responsibility really reflects the exact nature of corporate wrongdoing. From the foregoing we may conclude that the derivative nature of corporate liability, based upon the identification doctrine, does indeed have the major drawback that when no leading member (directing mind, representative) can be considered to have committed the offence, the legal entity cannot be found liable. Although this shortcoming could sometimes be remedied by loosening the rather strict condition of identifying the concrete person(s) within a company whose actions and mental state can be attributed to the corporation, or by allowing a more flexible application when offences are committed by omission or due to lack of supervision, the attribution method itself still suffers from its anthropomorphic prejudice that corporations can only will and act through individual human beings. In other words, a major conceptual flaw is that a nominalist attribution does not take into account the fact that criminogenic corporate strategies, policies and practices may originate from any level of staff, and not only from the upper levels of the corporation. In the words of Wells, criticising the shortcomings of the identification doctrine:

> 'The idea that only certain people act as the company presents a problem over and above the difficulties attending any such line-drawing exercise. While the company is regarded as a fiction, it is none the less real. Whatever the managing director does as an individual will be entirely different in its scope and effect from anything a managing director does within the company. The same goes for other workers. It is true that they could engage in a fight in the canteen which would be no different

> in its impact than a fight in the local pub. But once the individual in the company does anything which is part of the greater enterprise of which she is a part, then she contributes to the corporate effect. Whatever the branch manager of Tesco did with special offers (the subject of his prosecution) he was only able to do because the company had invested in and maintained the shop, the supplies to it, the posters advertising the offer, and so on. The idea that some people within a corporation act as that corporation while others do not is fundamentally flawed.'[46]

Corporations may function more by a group dynamic than by individual effort, yet a nominalist approach to corporate liability seems to assume that responsibility for the conduct of the corporation can be only attributed by looking at the conduct of its key personnel within the organisation. This masks the corporate reality that some acts (and this is even more true for omissions where duties of care are violated) may flow from group norms and policies rather than from isolated individual decisions and actions.

In addition, and more practically speaking, it may not always be easy to identify one or several persons within a corporation whose conduct and mental state can be attributed to the company. Different individuals within the organisation may bear varying degrees of responsibility for a criminal result that has occurred and fault may be diffused throughout the company.[47] This is especially so as the actual practice of corporate decision making is often not easy to determine by courts. 'A pliant board of directors may be little more than a "rubber stamp", and a CEO with a high profile may be a mere figurehead. Junior executives may wield far more power behind the scenes than their job title would imply.'[48] It does not make much sense to confine corporate liability to the conduct of persons who define the company's policies when it is often the people implementing those policies that wield control over the commission of the offence. Criminogenic corporate policies and practices may stem from any level of staff and are very often the result of the interaction of several forms of blameworthy behaviour.

Furthermore, it has been criticised that the identification doctrine makes it considerably easier to hold small corporations liable, as in these cases the person who is in fact the directing mind is also very often the person who is actively involved in the daily business operations; in contrast, the identification doctrine may encounter difficulties in relation to larger and more complex corporations.[49] Senior officers in large-scale operations are unlikely to be involved in the company's daily operations.[50] Moreover, decisions in large corporations are often taken at the level of branches or units or at the level of middle management.[51] In these cases a large company might be able to avoid responsibility for these decisions. This is demonstrated by the fact that the rare cases in which a company was held liable for manslaughter in England all involved small companies with uncomplicated organisational structures.[52] Illustrative is the case against the leisure company OLL Ltd, which was a one-man company owned by Mr Kite. Kite and OLL Ltd were held liable for the death of four children who were on a canoe trip because a duty of care was grossly breached, due to a lack of safety policy. The jury considered Mr Kite accountable for the events even though the actual running of the centre was done by a site manager.[53] As Mr Kite was the directing mind behind OLL Ltd, the company could be easily identified with him.[54]

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[46] C. Wells, 'Corporations and Criminal Responsibility' (Clarendon Press 1993), pp. 109–110.

[47] J Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), p. 62.

[48] J Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), p. 65.

[49] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 14.

These shortcomings have earned the doctrine of identification in England the reputation that 'it works best in cases where it is needed least and works worst in cases where it is needed most'.[55] A clear illustration of the shortcomings of this derivative approach can be found in the manslaughter prosecution of P&O European Ferries (Dover) Ltd for the deaths resulting from the capsizing of its 'roll-on roll-off' ferry Herald of Free Enterprise. On the evening of 6 March 1987, the Herald of Free Enterprise sank soon after leaving the Belgian port of Zeebrugge, en route to Dover. The ferry rolled over because her bow doors remained open as she left port, and ended up half-submerged in shallow water. At least 192 people lost their lives. The death toll was the worst for a British vessel in peacetime since the sinking of the Titanic in 1912.

Justice Sheen conducted a formal investigation into the disaster and concluded that the accident was partly caused by the 'serious negligence in the discharge of their duties' by the captain, chief officer and assistant bosun. But he also found the company itself had been at fault, remarking that a full investigation into the circumstances of the disaster leads to the conclusion that the underlying faults lay higher up in the company. All concerned in management, from the members of the board of directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. 'From top to bottom the body corporate was infected with the disease of sloppiness revealing a staggering complacency [...] Individually and collectively they lacked a sense of responsibility.'[56] Nevertheless, the trial judge ruled that the manslaughter charges against the corporation could not succeed because there was insufficient evidence to prove that a senior officer of the company, who could be identified as the company, had committed gross negligence manslaughter.

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[50] J. Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), p. 63.

[51] E. Colvin, 'Corporate Personality and Criminal Liability' Criminal Law Forum (1995), p. 15.

[52] J. Clough, 'Bridging the theoretical gap: the search for a realist model of corporate criminal liability' Criminal Law Forum (2007), p. 273.

[53] R v Kite and others [1994] NLJ 1714.

[54] S. Menis, 'The Fiction of the Criminalisation of Corporate Killing' Journal of Criminal Law (2017), pp. 470–471.

[55] J. Gobert and M. Punch, 'Rethinking Corporate Crime' (Butterworths Lexis Nexis 2003), p. 63.

Other failed prosecutions also show the same disadvantages of a derivative corporate liability which is solely based upon individual fault. For this reason, no one could be found criminally liable for the occurrence of several tragic disasters, including the King's Cross Underground fire (1987), the Piper Alpha oil platform explosion (1988), and the rail crashes in Clapham (1988), Southall (1997), Ladbroke Grove (1999), Hatfield (2000) and Potters Bar (2002).[57]

Following considerable criticism of the application of the identification doctrine, especially in manslaughter cases, the English legislator has developed a form of corporate liability that transcends individual responsibility. We are referring here to the much debated Corporate Manslaughter and Corporate Homicide Act 2007.

3.4. THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMA) is definitely a step in the direction of a more realistic or organisational approach to corporate liability. In essence, the CMA contains a single offence of corporate manslaughter, abolishes the identification doctrine for common law manslaughter charges and substitutes it with what can be called a 'qualified attribution principle', focusing less on individual responsibility and more on organisational fault. The gist of the offence can be found in section 1(1) and (3) CMA, read in conjunction:

> '(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised
> a. causes a person's death, and
> b. amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.'
>
> '(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).'

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[56] Justice Sheen, 'The Merchant Shipping Act 1894: Herald of Free Enterprise', Report of Court No. 98074 [14/1] (1987). Also see: S. Crainer, 'Zeebrugge: learning from disaster: lessons in corporate responsibility' (Herald Charitable Trust 1993).

[57] J. Clough, 'Bridging the theoretical gap: the search for a realist model of corporate criminal liability' Criminal Law Forum (2007), p. 272.

One can deduce a fivefold evaluation scheme from section 1. The prosecution will have to establish the following: (i) that a relevant duty was owed to the victim by the organisation; (ii) that the breach of the duty was a result of the way the organisation had organised and managed its activities; (iii) that a substantial element of the breach of the duty was due to the way the senior management staff had organised and managed activities; (iv) that the breach of the duty amounted to a gross one; and finally (v) that the victims' death was caused by the breach of the duty.[58] Compared with the traditional identification doctrine, this new offence may be called more 'realistic' in the sense that it acknowledges that management failure may be seen as the cause of a person's death.

3.4.1. *The relevant duty of care*

Suppose, then, that a death has been caused by the way that the organisation's activities were managed and organised. According to section 1(1) CMA, the corporate liability must be based upon the gross breach of a duty of care. Section 1(4)(b) provides that: 'a breach of a duty of care by an organisation is a gross breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances.' This builds upon the traditional common law definition of gross negligence, but avoids the circular reasoning, stated in *R v Adomako*,[59] that the criminal standard for negligence is met when the jury thinks the breach was criminal. Section 2 sets out the scope of the duty of care imposed on corporations:

> '(1) A relevant duty of care, in relation to an organisation, means any of the following duties owed by it under the law of negligence –
> (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
> (b) a duty owed as occupier of premises;
> (c) a duty owed in connection with –
> (i) supply by the organisation of goods or services (whether for consideration or not),
> (ii) the carrying on by the organisation of any construction or maintenance operations,
> (iii) the carrying on by the organisation of any other activity on a commercial basis, or
> (iv) the use or keeping by the organisation of any plant, vehicle or other thing
> (d) a duty owed to a person who, by reason of being a person within subsection (2) [a detained person], is someone whose safety the organisation is responsible.'

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[58] D. Ormerod, 'Smith and Hogan: Criminal Law' (Oxford University Press 2008), p. 539; D. Ormerod and R.D. Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' Criminal Law Review (2008), p. 598.

[59] [1994] UKHL 6.

The CMA does not impose any new duties, but is based on duties which already exist in civil law, arising either by statute or by common law.[60] Arguably, the duties most relevant in practice will stem from an employment relationship (section 1(a)), or the occupation of premises by the organisation (section 1(b)).[61]

It is important to note that in section 8(3) CMA we see again a clear sign of a realistic approach, as it introduces a factor of 'corporate culture' into the evaluation of a gross breach of a duty of care. It requires the jury to take into account whether and to what extent the organisation has failed to comply with health and safety legislation and, more importantly adds:

> 'The jury *may* also –
>
> a. consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure […] or to have produced tolerance of it […].'

This shows how the CMA makes corporate culture a possible element in the determination of fault on the company's side.

3.4.2. *The role of senior management*

As mentioned before, regarding the necessary fault element, the CMA focuses on management failure and makes it possible to aggregate the fault of a variety of individuals within the organisation to establish such a failure of management.[62] However, in contrast with the original much broader proposals, the corporate fault is at the same time restricted by the requirement that the role of senior management has to be a substantial element in the breach of the duty of care. Thus, the CMA still echoes some elements (and therefore also some possible shortcomings) of the identification doctrine, requiring that the senior manager(s) played a substantial role in the management failure. The CMA defines senior management in section 1(4) as:

> '(c) […] the persons who play significant roles in –
>
> (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
>
> (ii) the actual managing or organising of the whole or a substantial part of those activities.'

Despite the fact that this definition is much broader than the 'directing mind and will' pursuant to the identification doctrine, some commentators see this senior management test as a limitation, as it may bring back the issue of how to identify certain individuals and their role within the organisation.[63] However, recent case law seems to indicate that the prosecution does not necessarily have to name the relevant senior managers involved in the breach. A good example is the case of *Maidstone and Tunbridge Wells NHS Trust*, where the organisation was charged with corporate manslaughter in relation to the death of a woman following a caesarean section. Although this charge was ultimately dismissed on the basis that there was no 'gross' breach',[64] judicial comments clarified the senior management test: what is required is to identify the 'tier' of management that can be considered the lowest level of senior management within the organisation that is culpable for the offence, not the identification of specific individuals.[65]

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[60] D. Ormerod, 'Smith and Hogan: Criminal Law' (Oxford University Press 2008), p. 540.

[61] D. Ormerod, 'Smith and Hogan: Criminal Law' (Oxford University Press 2008), p. 540.

[62] D. Ormerod and R.D. Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' Criminal Law Review (2008), p. 602.

Ten years after the CMA was enacted, it is observed that the senior management 'test' is not as problematic as expected. By the end of 2017, there have been 25 corporate manslaughter convictions and only a few acquittals or cases where charges have not been pursued. However, the reason why the senior management test was not a serious obstacle is because most convictions have been of small or medium-sized corporations. Moreover, in most cases the defendant company pleaded guilty, which means there was no need to analyse the role of senior management.[66] Nonetheless, there has been one notable successful prosecution of a large company, CAV Aerospace Ltd, which had just over 500 employees.[67] It was also the first prosecution of a parent company for a fatal accident that happened at the site of its subsidiary. CAV Aerospace Ltd was convicted for collective management failings that caused the death of an employee who was crushed in a warehouse. As senior management had consistently failed to act on multiple warnings of unsafe stock levels, the company was fined £600,000, at the time the highest-ever fine in a corporate manslaughter case.[68]

Regarding the role of senior managers, we can point out yet another criticised aspect of the CMA: senior managers and directors themselves are exempt from any secondary liability. According to section 18, an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter. This is contrary to the traditional participation rules of criminal law where individual liability for accessories is the norm. But it is also quite unusual in comparison with most other legal systems that accept the criminal liability of senior officers alongside that of the corporation. The fact that senior managers may have contributed to or played a role in the organisational fault does not negate their own individual responsibility.[69] On the contrary, they are legal agents in their own right, operating within their own sphere of competency and moral responsibility.

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[63] D. Ormerod and R.D. Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007', Criminal Law Review (2008), p. 590.

[64] S. Tombs, 'The UK's corporate killing law: Un/fit for purpose' Criminology & Criminal Justice (2017), p. 11.

[65] V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' The Journal of Criminal Law (2018), p. 60.

[66] V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' The Journal of Criminal Law (2018), p. 57.

[67] S. Tombs, 'The UK's corporate killing law: Un/fit for purpose' Criminology & Criminal Justice (2017), p. 15.

[68] S. Field, 'Criminal liability under the Corporate Manslaughter and Corporate Homicide Act 2007: a changing landscape' International Company and Commercial Law Review (2016), pp. 231–232; V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' The Journal of Criminal Law (2018), p. 59.

By excluding any element of (secondary) individual liability, the CMA has missed the opportunity to pierce the aforementioned 'criminal corporate veil' that allows senior officers to avoid criminal charges by scapegoating the organisational culture.[70] Interest groups representing employees and victims argued strongly in favour of an additional individual liability, but ultimately the government succumbed to business pressure, claiming that individual liability was already sufficiently provided for by the traditional common law offence of gross negligence manslaughter.[71] Although it is indeed possible to bring charges against both the organisations and the individuals in relation to the same death, successful convictions of directors or managers are complicated and very rare. There is even a clear trade-off between guilty pleas for the CMA charge and dropping those against individual directors.[72] Arguably, the exemption of individual liability may reduce the deterrent effect of the CMA and reinforces the misconception that corporate and individual responsibilities should necessarily exclude each other.

One may conclude that the CMA has a hybrid nature: it recognises the need for an organisational model of corporate liability based on management failure, but at the same time it circumscribes this possibility by restricting it to 'senior management'. We can say that although the CMA is better equipped to address corporate manslaughter than the identification doctrine, it still suffers from several shortcomings that weaken its application. Recently, the Grenfell Tower fire (2017) has rekindled the debate about the ability of the criminal law to hold organisations and individuals criminally liable for gross negligence manslaughter.[73] It remains to be seen how the CMA will be applied to such large-scale factually complex tragedies.

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[69] V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' The Journal of Criminal Law (2018), p. 60; C. Wells, 'The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' Criminal Law Review (1996), p. 553.

[70] C. Wells, 'Corporate criminal liability: a ten year review' Criminal Law Review (2014), p. 877.

[71] D. Whyte, 'Challenging the Impunity of our most prolific killers' Employment Law Bulletin (2015), p. 6.

[72] C. Wells, 'Corporate criminal liability: a ten year review' Criminal Law Review (2014), p. 877; S. Menis, 'The Fiction of the Criminalisation of Corporate Killing' The Journal of Criminal Law (2017), pp. 473–477.

4. CORPORATE LIABILITY IN THE NETHERLANDS

Of all the civil law jurisdictions, the Netherlands was arguably the earliest adopter of corporate criminal liability. Shortly after the Second World War, in 1951, the Dutch legislator created the so-called Economic Offences Act (EOA), which aimed to unify and improve the quite uneven enforcement, at that time, of economic (regulatory) offences. In order to effectively combat economical crime, a specific provision on corporate liability was also included. Article 15 EOA stated that economic offences could be committed by legal persons, and that legal persons could be prosecuted and punished.[74] A most decisive step was, however, taken in 1976 when Article 15 EOA was replaced by a general provision on corporate criminal liability in the Dutch Criminal Code: Article 51.

4.1. CORPORATE (AND INDIVIDUAL) LIABILITY PURSUANT TO ARTICLE 51 DCC

Article 51 DCC is, in principle, applicable in every domain of criminal law, which means that corporate liability is not limited to the specific category of economic offences.[75] It reads as follows:

> '1. Offences can be committed by natural persons and legal persons.
> 2. If an offence has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:
> (1) the legal person, or
> (2) those who have ordered the offence, as well as on those who have actually controlled the forbidden act, or
> (3) the persons mentioned under (1) and (2) together.
> 3. For the application of the former subsections, equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose.'

It is important to note that, according to Article 51(2) DCC, when an offence is committed by a legal person, it is up to the public prosecutor to decide whether it is opportune to prosecute the corporation or rather those who have ordered or controlled the offence. There is, however, also the possibility of a concurring secondary liability of the latter, which exemplifies the aforementioned idea that corporate liability and liability of leading persons operating on behalf of the corporation should not exclude each other. Even more, this secondary liability pierces the corporate veil by not limiting the leading persons to 'formal' senior officers, such as its board of directors, nor to any other person who holds an official position in the corporation. Any agent or employee who has a factual directing or controlling power over the offence committed may be prosecuted instead of or together with the legal person.[76] Recently the Supreme Court confirmed this procedural rule in a landmark decision in a case of tax fraud, and also clarified some of the criteria for this form of secondary liability it had developed over the years.[77] In essence, the Supreme Court stated that not only active conduct, but also a more 'passive involvement' in the offence may trigger individual liability, especially in cases where the leading person had a duty to prevent or stop the commission of the offence.[78] Regarding the required subjective fault element, the Supreme Court ruled that conditional intent suffices and that the proof of 'acceptance' of the crime can in some instances even be derived from the mere knowledge the leading person has of certain facts related to the offence, or when he has organised the business operations in such a way that the employees could not have executed his orders without committing offences.[79]

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[73] V. Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-Year Review' The Journal of Criminal Law (2018), pp. 50–51.

[74] A.N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), p. 6.

[75] B.F. Keulen and E. Gritter, 'Corporate Criminal Liability in the Netherlands' Electronic Journal of Comparative Law 2010, pp. 2–3, www.ejcl.org.

With regard to the criminal liability of the corporation itself, it is of course interesting to see that Article 51 DCC only states that legal persons can be held criminally liable, just like natural persons, but that there are no precise criteria given to establish this corporate liability. Over the years, Dutch case law had developed different criteria, but the precise meaning and scope of these criteria has not always been that clear, which has resulted in some uncertainties over how to construct corporate liability. For example, there was much debate over whether the so-called 'power and acceptance' criteria for functional perpetration, as originally developed in 1954 for natural persons in the infamous *IJzerdraad* (iron wire) judgment,[80] and later also applied to corporations,[81] were the only (most) suitable criteria for holding legal persons criminally liable. It was observed that these criteria may be too strict or even still too tailored on the liability scheme for natural persons, meaning that other more corporation-centred criteria should also be made available.[82] Finally, in 2003, the Dutch Supreme Court settled the matter and delivered a landmark decision, the so-called Slurry decision (*Drijfmest arrest*), on the conditions for corporate criminal liability, more specifically regarding the criteria for the actus reus of legal persons.[83]

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[76] HR 21 January 1992, ECLI:NL:HR:1992:ZC8948, NJ 1992, 414. To be complete, this secondary liability is not restricted to natural persons, but can also be applied on another legal person who has ordered or controlled the offence. See for an elaborate study on this secondary liability: S.N. de Valk, 'Aansprakelijkheid van leidinggevenden' (Kluwer 2009); N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), pp. 72–93.

[77] HR 26 April 2016, ECLI:NL:HR:2016:733.

[78] Cf. HR 23 June 1987, ECLI:NL:HR:1987:AC9905, NJ 1988, 44.

[79] Cf. HR 16 December 1986, ECLI:NL:HR:1986:AC9607, NJ 1987, 32; HR 22 March 1983, ECLI:NL:HR:1983:AC7905, NJ 1983, 502.

[80] See also on this judgment and functional perpetration: Chapter X of this book.

[81] Cf. HR 1 June 1981, NJ 1982, 80; HR 14 January 1992, NJ 1992, 413.

4.2. THE ATTRIBUTION CRITERIA DEVELOPED BY THE SUPREME COURT

The facts of this case can be summarised as follows. Corporation A was charged with pollution of the soil as an unknown third party had deployed slurry (liquid manure) in breach of the Soil Protection Act (*Wet Bodembescherming*) on a property which the defendant managed on behalf of the owners (B). The property was effectively managed on behalf of the suspect (A) by C, who was working for B. The lower court had convicted the suspected corporation (A) because it considered it a task of the management that the property was held in accordance with the law. The Supreme Court found this reasoning insufficient and held that the exact scope of the management should have been closely scrutinised before the conduct could be attributed to the legal person. The court summarised and clarified earlier jurisprudence on this matter and concluded from the legislative history of Article 51 DCC that the legislator had granted total freedom to the judiciary to determine when a specific conduct can be attributed to a corporation. Here are some leading statements of the Court's decision:

> **Dutch Supreme Court, 21 October 2003, NJ 2006, 328**
>
> 'According to legislative history a corporation (within the meaning of Article 51 of the Criminal Code) can be regarded as a perpetrator of a criminal offense if the relevant conduct may be reasonably attributed. Also in case law this attribution has long been recognised as a basis for perpetratorship of the corporation (cf. HR February 23, 1993, NJ 1993, 605 and HR November 13, 2001, NJ 2002, 219). Then the question arises when a (forbidden) conduct may reasonably be attributed to a corporation.

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[82] See for a good summary of this doctrinal discussion: J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), pp. 475–477.

[83] This primary focus on the conduct requirement is largely explainable by the simple fact that the offence committed was a regulatory environmental offence not requiring any fault element, hence no specific legal questions on that issue had to be addressed. As we will see later on, other case law has developed on a very pragmatic case-by-case basis different mechanisms for attributing mens rea to legal persons.

> The answer to that question depends on the specific circumstances of the case, which also include the nature of the (forbidden) conduct. It is therefore difficult to formulate a general legal rule. However, an important point of reference for attribution is whether the conduct has occurred or has been committed within the sphere of the corporation. Such conduct may in principle be attributed to the corporation. One may speak of conduct within the sphere of the corporation if one or more of the following circumstances occur:
>
> (1) At stake are acts or omissions of the corporation by somebody who works for the corporation due to an employment contract or for other reasons;
> (2) The conduct corresponds with the normal corporate management;
> (3) The conduct served [benefited] the corporation in its business;
> (4) The corporation could control whether the conduct could or could not take place and if comparable conduct was according to the course of events accepted. Acceptance also encompasses situations in which a duty of care was violated by a corporation if the observance of the duty could be reasonably expected from the corporation.'

Even a quick reading of this judgment shows us that the Supreme Court has clearly chosen a flexible, quite pragmatic and open approach to corporate liability.[84] First, the Supreme Court ruled that the legal basis for criminal liability is understandably a normative one: a corporation can only be held criminally liable if the attribution of the offence to the legal person can be considered 'reasonable'.[85] This opens the door to a variety of criteria.[86] Second, the court gives some general indications as to when criminal conduct could be reasonably attributed to a corporation. As this is dependent on the facts and circumstances of the particular case, a universally valid criterion cannot therefore be formulated. However, an important point of reference can be seen in the fact that the conduct occurred 'within the sphere' (or scope) of the corporation, and this may be the case if one or more circumstances occurred. If we now take a closer look at these circumstances, which are neither cumulative nor exhaustive, it becomes clear that they represent a pragmatic mix of nominalist and realist criteria. This allows courts to establish both derivative and direct forms of corporate liability.[87]

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[84] S.N. de Valk, 'Aansprakelijkheid van leidinggevenden' (Kluwer 2009), p. 330; A.N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), pp. 44–46.

[85] J. de Hullu, 'Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 166.

[86] E. Gritter, 'Duidelijkheid omtrent corporatief daderschap. Enige beschouwingen naar aanleiding van het Drijfmest-arrest' Tijdschrift voor onderneming en strafrecht (2004), pp. 31–38.

[87] M. Hornman and E. Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate Mens Rea' in F. de Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M. Koenraadt, F.G.H. Kristen, D. Rozenblit and E. Sikkema (eds.), Overarching views of delinquency and deviancy (Gouda Quint 2015), pp. 293–295.

The first circumstance requires that the act was committed by someone who is employed by or otherwise works for the corporation. This criterion is obviously quite broad. Every conduct of an employee, and not only of a senior officer, could be attributed to the legal person. The formal position of the employee within the corporation is not really relevant. The circumstances of the case at hand, in combination with the underlying offence, will determine whether or not a particular conduct can be attributed to the corporation. Arguably this criterion uses a nominalist model and even bears some resemblance to vicarious liability. Some commentators therefore suggest that this may be best applied to regulatory (strict) liability offences.[88]

The second circumstance is met when the conduct fits the everyday normal business of the corporation. In other words, this criterion is focused on the question of whether a conduct is not alien to the conventional corporate management. Relevant points of reference might be the corporation's normal business activities and the way in which it conducts its day-to-day business operations. This criterion is arguably a more realist one, focusing purely on corporate management as a determining circumstance.

The third circumstance requires that the conduct benefited the corporation. This serves to exclude corporate liability in cases where the conduct benefited solely a (maverick) employee and not the legal entity. This is undoubtedly the most objective criterion, and it not only covers conduct that may lead to a direct monetary profit, but also includes indirect gains, such as a better market position, or illegal conduct that leads to fewer financial costs.[89]

The fourth and final circumstance refers to the already mentioned 'power and acceptance' criteria of functional perpetration first developed in the *IJzerdraad* judgment. The concept of power in this context emphasises the idea of a hierarchy in an organisation and the ability to influence the acts of individuals and groups through the operation of that hierarchy. The notion of acceptance involves a judgment on corporate monitoring of risky or illegal business.[90] In addition, these criteria also carry a normative weight, as they imply a judgment on the quality of corporate diligence in establishing, monitoring and enforcing appropriate standards. They definitely reflect a more realist view of corporate wrongdoing, especially in the light of the statement that acceptance also includes 'situations in which a duty of care was violated by a corporation if the observance of the duty could be reasonably expected from the corporation.' In other words, a legal person will be considered to have accepted a particular criminal conduct if this can be derived from the course of events, for instance if the corporation has neglected its duty to supervise.[91] Arguably, although this fourth criterion was formulated by the Supreme Court as one of the possible circumstances for establishing the actus reus of the corporation, the 'acceptance' element definitely also includes a subjective fault element. This makes this criterion ideally equipped for holding corporations liable for mens rea offences.

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[88] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 478.

[89] A.N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), pp. 49–50.

[90] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 478.

It is apparent that the Dutch Supreme Court has chosen a pragmatic approach, taking the corporate reality and the diversity of corporate wrongdoing quite seriously, without adopting a specific foundational theory for guidance.[92] However, the judgment has also generated some criticism in legal scholarship as it gives rise to some unresolved questions and uncertainties. First, as this list of criteria is not meant to be exhaustive, courts may still come up with different criteria that allow them to reasonably attribute an offence to the corporation. Given the wording of the judgment, even the point of reference for corporate liability – the offence has to be committed within the scope of the corporation – is not an absolute.[93] Second, the question arises as to how one should actually perceive the functional relationship between the four circumstances. Is there a kind of hierarchy? In which situations and for what kind of offences should the courts apply which criterion? The Supreme Court left these questions unanswered.

Nevertheless, it can be seen that the Dutch courts have applied the 'Slurry judgment' in a very open but unproblematic manner.[94] A factor determining the choice of the courts to prefer one criterion over another seems to be the underlying offence with which the corporation is charged. If the offence requires the proof of mens rea it is most likely that the more subjective 'power and acceptance' criteria will already be applied, while more objective criteria like the benefit criterion will come into play when the offence is only a strict liability offence or a misdemeanour. It is, however, interesting to note that in most cases courts base corporate liability on a combination of criteria, even though such a cumulative approach is not necessary. For example, in 2007 the 's Hertogenbosch Court of Appeal used the criterion of normal corporate management, in conjunction with the benefit criterion and the power and acceptance criteria, to hold a company criminally liable (as a co-perpetrator) for the intentional pollution of the water surface in the course of the construction work for a roundabout.[95] And in a case where two asbestos removal workers fell through the roof of a building, which also resulted in serious bodily harm to one them, the Arnhem Court of Appeal used the same circumstances to convict the corporation that employed them for violation of the health and safety regulations (*Arbeidsomstandighedenwet*).[96]

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[91] J. De Hullu, 'Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 169; A.N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), pp. 50–51.

[92] S.N. de Valk, 'Aansprakelijkheid van leidinggevenden' (Kluwer 2009), p. 330; B.F. Keulen and E. Gritter, 'Corporate Criminal Liability in the Netherlands' Electronic Journal of Comparative Law 2010, p. 5, www.ejcl.org.

[93] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 480.

[94] C. Kelk (bewerkt door F. de Jong), 'Studieboek materieel strafrecht' (2013), p. 513.

As already mentioned, Article 51 DCC is a general criminal law provision and can accordingly also be applied to common criminal offences, such as manslaughter. A good example is a decision in 2009 of the Court of First Instance of Roermond, which convicted a corporation for negligent manslaughter (Article 307 DCC) by applying the 'power and acceptance' criteria.[97] The court held that these criteria can be used to attribute the conduct of an executive employee, who had instructed another employee to clean guttering on the roof of the business premises without sufficient safety measures in place, to the corporation. In the course of this work the employee fell off the roof and subsequently died. As the offence required negligence, the court applied the 'power and acceptance' criteria and decided that the corporation had violated the duty to carry out work in accordance with the applicable health and safety regulations and subsequently held the corporation liable for the death of the employee.[98]

4.3. ATTRIBUTION OF MENS REA TO CORPORATIONS

This handful of examples already indicates how courts do not seem to struggle too much with holding corporations criminally liable for offences that require proof of fault. Although the Slurry decision was only concerned with the question of attribution of conduct to corporations, we can infer from other case law that a similar open approach is followed for the attribution of the mens rea element. In the event that the underlying offence requires proof of intent, the Supreme Court accepts two main approaches.[99] Firstly, corporate intent may be established in a derivative way by attributing an individual's intent to the legal person. For example, in 2017, in a case of serious environmental pollution which constituted an intentional violation of the Soil Protection Act (*Wet Bodembescherming*), the Supreme Court confirmed older case law that the intent of the corporation can be derived from a senior officer, in the case at hand the project leader responsible for the cleaning up of the seriously contaminated ground.[100] This nominalist approach is not only possible where a senior manager's intentions are concerned; some case law also allows the intent of lower-ranking personnel to be attributed to the legal person, depending on the circumstances of the case, such as the size and internal organisation of the corporation.[101] It is, however, not always necessary to prove individual intent in order to establish corporate intent.[102] Accordingly, a second, more realist way of establishing corporate intent is to base the mens rea directly on the corporate policy and the effective daily procedures within the corporation.[103]

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[95] Hof 's Hertogenbosch 24 April 2007, ECLI:NL:GHSHE:2007:BA4471.

[96] Hof Arnhem 3 April 2012, ECLI:NL:GHARN:2012:BW1016. See also: Rb. Oost-Brabant 22 March 2017, ECLI:NL:RBOBR:2017:1681.

[97] Rb. Roermond 27 January 2009, ECLI:NL:RBROE:2009:BH1649.

[98] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 484. See for a concise overview of post-Slurry case law: A.N. Kesteloo, 'De rechtspersoon in het strafrecht' (Kluwer 2013), pp. 61–65.

[99] HR 26 April 2016, ECLI:NL:HR:2016:733.

The same methods can of course also be used to establish corporate negligence, although corporate fault is in most cases then directly deduced from the violation of a duty of care. For example, in 2006 the Supreme Court held a corporation that ran a swimming pool criminally liable for negligent manslaughter of two children who had drowned because it had violated a duty of care by insufficiently ensuring the safety of the pool.[104] In a recent case from 2018, a corporation that had organised a monster truck stunt show was convicted, as was the driver of the truck, for the deaths of three people and bodily harm to 28 people, because the organisation had violated a duty of care by failing to identify the risks associated with such an event, and by subsequently neglecting to take the necessary safety measures that could have prevented the driver from ploughing into the crowd of spectators.[105] On the basis of the case law, it is fair to say that not only the actus reus, but also the mens rea of offences committed by corporations are established using the concept of 'reasonable attribution'.

In conclusion, one may characterise the Dutch approach to corporate criminal liability as a flexible and pragmatic combination of both nominalist and realist criteria. The concrete attribution of corporate conduct and fault may be either derivative or direct, depending on the facts and circumstances of the case, such as the nature of the offence committed, the size of the corporation and its organisational structure. Alongside corporate liability, the Dutch system also provides for a specific form of secondary liability for those who have ordered or agreed to the commission of the offence.

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[100] HR 14 February 2017, ECLI:NL:HR:2017:240.

[101] HR 15 October 1996, ECLI:NL:HR:1996:ZD0145, NJ 1997, 109. J. De Hullu, 'Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht' (Kluwer 2015), p. 267.

[102] HR 29 April 2008, ECLI:NL:HR:2008:BB8977, NJ 2009, 130.

[103] HR 26 April 2016, ECLI:NL:HR:2016:733.

[104] HR 22 August 2006, NJ 2006, 484; Cf. Rb. Zeeland West-Brabant, 5 July 2017, ECLI:NL:RBZWB:2016:4045. But see for an example of an acquittal, in another drowning case, because it could not be proven there was a gross breach of a duty of care: Rb 's Hertogenbosch 8 February 2007, ECLI:NL:RBSHE:2007:AZ8008.

[105] Hof 's Hertogenbosch 23 May 2018, ECLI:NL:GHARL:2018:4675.

5. ADMINISTRATIVE CORPORATE LIABILITY IN GERMANY

As already mentioned, some countries exclude legal persons from criminal law and provide alternative administrative sanctions instead. Germany is undoubtedly the most well-known example of such a quasi-criminal approach.[106] Following the classic adage *societas delinquere non potest*, the principle in German criminal law is that corporations are not criminally liable. The main arguments are very traditional: corporations do not have the capacity to act, corporations cannot be culpable, and criminal sanctions are appropriate, by their nature, only for human beings. In Germany corporate misconduct is therefore the subject of a system of administrative liability, developed in the Administrative Offences Act (*Ordnungswidrigkeitengesetz*) of 1968.

5.1. CORPORATE LIABILITY ACCORDING TO §30 OF THE ADMINISTRATIVE OFFENCES ACT

Pursuant to §30 of the Administrative Offences Act (AOA) an administrative fine can be imposed on a corporation if certain leading persons operating on behalf of the legal person have committed a criminal or administrative offence. The most relevant parts of this provision read as follows:

> '(1) Has any person acting
> 1. in the capacity of an agent authorised to represent a legal person, or as a member of such an agency,
> 2. as chairman of the board of an association without legal capacity, or as a member of such a board,
> 3. as a partner authorised to represent a partnership with legal capacity, or
> 4. as the authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers 2 or 3, or
> 5. as another person responsible for the management of the operation or undertaking of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal

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[106] Also Greece, Sweden and Latvia have adopted to a large extent the German model. See for an overview: G. Vermeulen, W. De Bondt and C. Ryckman, 'Liability for legal persons for offences in the EU' (Maklu 2012), pp. 73–78.

> person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.
>
> (2) The fine shall be
>
> 1. in the case of a criminal offence committed with intent, not more than ten million Euros,
> 2. in the case of a criminal offence committed negligently, not more than five million Euros.
>
> In cases of an administrative offence, the maximum fine that can be imposed shall be determined by the maximum fine imposable for the administrative offence concerned. If the statute refers to this provision, the maximum amount of the administrative fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.
>
> […]
>
> (4) If criminal proceedings or regulatory fining proceedings are not commenced on account of the criminal offence or of the regulatory offence, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with, the regulatory fine may be assessed independently. Statutory provision may be made to the effect that a regulatory fine may be imposed in its own right in further cases as well. Independent assessment of a regulatory fine against the legal person or association of persons shall however be precluded where the criminal offence or the regulatory offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.
>
> (5) Assessment of a regulatory fine incurred by the legal person or association of persons shall, in respect of one and the same offence, preclude a forfeiture order, pursuant to sections 73 or 73a of the Penal Code or pursuant to section 29a, against such person or association of persons.'[107]

What immediately stands out is that §30 AOA can be applied to both criminal and administrative offences (*Ordnungswidrigkeiten*). Arguably, this characteristic, together with the substantial fines that can be imposed, allow one to question the so-called non-criminal nature of this administrative sanctioning system. Unlike the English system, where the criteria used for attributing corporate liability largely depend on the kind of offence that is committed, the AOA covers all categories of offences. A legal person may therefore be held liable not only for typical economical offences, like the establishment of illegal trusts, or for environmental crimes, but also for more common crimes, such as fraud, bribery, extortion and even manslaughter.[108]

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[107] Translation our own, largely based upon www.gesetze-im-internet.de/englisch_owig/.

[108] M. Böse, 'Corporate Criminal Liability in Germany' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), p. 233.

Next, the mode of liability enshrined in §30 AOA is clearly a nominalist one, resembling the identification doctrine; a natural person representing the legal person must have committed an offence from which the corporate liability is derived.[109] However, the group of persons mentioned in §30 (1) AOA is not limited to those who could be perceived as the 'directing mind and will' of the corporation, or its senior management, as is the case in the narrow traditional English application of the identification doctrine. §30 (1) No. 5 AOA specifically includes lower managing officers who are in charge of supervising the conduct of business or have other tasks involving controlling powers in a managerial position.[110] This provision was adopted in 2002 to implement the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests (1997).[111] This means that the conduct of persons authorised to exercise control within the corporation, such as the members of a supervisory body, or those responsible for the internal financial auditing may also give rise to corporate liability.

Obviously, the legal person is not liable for just any offence that is committed by its human representatives. The conduct of the leading persons must be rightly qualified as corporate wrongdoing. §30 AOA requires that the leading person must have violated a legal duty incumbent upon the legal person, or that the corporation must have gained (or was supposed to gain) a profit. These attribution criteria are alternatives; it is therefore for example possible to hold the legal person liable, even when there is no (intended) enrichment, as long as there is a violation of a relevant legal duty derived from the laws that regulate corporate activities.[112] One could refer here to duties related to the corporation's position as a manufacturer, employer, owner, distributor, etc., that are also used to ground the omission liability pursuant to §13 GCC. For instance, on the basis of health and safety regulations, an employer must guarantee workplace safety standards to protect the health of the employees.[113] The other attribution criterion of (intended) enrichment encompasses not only an actual increase of the corporation's assets, but also indirect gain, such as an improved position on the relevant market achieved for example by violation of competition law or bribery.

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[109] See: 2 November OLG Jena NStZ 2006, 533; 16 November OLG Düsseldorf NStZ 1996, 193; 20 March OLG Dresden NStZ 1997, 348.

[110] M. Böse, 'Corporate Criminal Liability in Germany' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), p. 234.

[111] Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, 6 June 1997, came into force 16 May 2009, OJ 1997 C 221/12.

[112] M. Böse, 'Corporate Criminal Liability in Germany' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), pp. 236–237.

[113] K. Rohall, '§30 OwiG' in L. Senge (ed.), Karlsruher Kommentar zum Ordnungswidrigkeitengesetz (C.H. Beck Verlag 2006), para. 76.

It is important to note that although in principle the administrative fine is imposed within the procedural framework of the (criminal or administrative) charge brought against the leading natural person, it is not necessary that the competent authorities institute or terminate such proceedings. §30 (4) AOA still allows the imposition of a fine, even though no individual is actually prosecuted or convicted for the offence. It is even possible to fine a corporation if the identity of the person who committed the offence cannot be established. Yet it is only the identity that need not be established. It must still be proven that a person falling within the category of §30 (1) AOA committed the offence.[114]

5.2. BREACH OF A DUTY TO TAKE SUPERVISORY MEASURES

The basic conditions of corporate liability in the German system are formulated in §30 AOA, but its scope of application is very much broadened by §130 of the same Act. This provision creates a separate administrative offence of the breach of a supervision duty. It proscribes the failure to take supervisory measures by the owner of the corporation. Consequently, if a person falling outside the scope of §30 AOA commits a criminal or administrative offence, the failure of the owner of the corporation to take supervisory measures that would have prevented or made the contravention much more difficult can itself give rise to the liability of the corporation as well. The relevant passage of §130 AOA reads as follows:[115]

> '(1) Whoever, as the owner of an operation or undertaking, intentionally or negligently fails to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.'

Corporate liability can thus arise if the owner fails to exercise supervision over persons placed under his control. The failure to supervise is assessed on a case-by-case basis. Factors that may play a role in this assessment are the internal structure and organisation of the company, as well as the internal division of tasks and the nature and the scope of the controlling and supervisory measures in place.[116] Thus, one may argue that §130 in conjunction with §30 AOA also has an important regulatory dimension by aiming to increase corporate compliance with prevalent diligence standards.[117]

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[114] See: 8 February 1994 BGH NStZ 1994, 346; K. Tiedemann, 'Wirtschaftsstrafrecht – Einführung und allgemeiner Teil' (Carl Heymanns Verlag 2007), para. 246.

[115] Translation: www.gesetze-im-internet.de/englisch_owig/englisch_owig.html.

One may conclude that the German system of administrative penalties against legal persons embodies a compromise between those who oppose, mainly on doctrinal grounds, corporate criminal liability, and those who still see the practical need for sanctioning corporations.[118] It is debated whether it is really accurate to distinguish this alternative system of administrative liability from the criminal law. On the one hand, it is argued that administrative sanctions are by their nature morally neutral and therefore do not fulfil the expressive normative aims traditionally belonging to criminal punishment.[119] On the other hand, there can be serious doubts about the so-called non-criminal nature of the AOA given the severity of the fines and the fact that they can also be imposed by criminal courts for genuine criminal offences. Such characteristics, together with the fact that there must still be some kind of fault, derived from the identification doctrine or the failure to exercise supervision, are convincing arguments to instead qualify this system as quasi-criminal in nature.[120]

It is worth noting that by the end of 2013 the government of the German federal state of Nordrhein-Westfalen proposed a draft bill on a federal Corporate Criminal Code (*Verbandsstrafgesetzbuch*) introducing genuine criminal liability for corporations.[121] Essentially, the draft envisions holding legal persons criminally liable for organisation-related violations without the need to establish fault of an individual perpetrator. It is sufficient that the violations were known about at a decision-making level. Proponents of the corporate criminal code argue that criminal liability would have positive preventive effects, such as enhancing a compliance culture. It could also lead to a different societal perception of the moral significance of corporate crime. However, it remains doubtful whether this draft has any chance of being followed up by the federal government. Although it has received some political appraisal, legal experts voiced numerous constitutional, procedural and doctrinal concerns.[122] According to some commentators the shortcomings of the current system could also be overcome by simply amending or changing the AOA.[123] Nonetheless, various incidents in recent years, such as the Volkswagen emissions scandal, keep the debate on the question of whether German law should establish genuine criminal corporate liability very much alive.

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[116] 2 November 2005 OLG Jena NStZ 2006, 533.

[117] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 460.

[118] M. Böse, 'Corporate Criminal Liability in Germany' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), p. 249.

[119] G. Stessens, 'Corporate criminal liability: A Comparative Perspective' International and Comparative Law Quarterly (1994), p. 503; J.C. Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Study', in A. Eser, G. Heine and B. Huber (eds.), Criminal Responsibility of Legal and Collective Entities (Edition Iuscrim 1999), p. 22; J. Kyriakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' Netherlands International Law Review (2009), p. 344.

[120] D. Roef, 'Strafbare overheden. Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring' (Intersentia 2001), pp. 164–174; J. Kyriakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' Netherlands International Law Review (2009), p. 344.

[121] See: Gesetzesentwurf eines Verbandsstrafgesetzbuchs, presented in 2013, Bundsrat Drucksachen [BR] 1/13 (Ger.), https://dicoev.de/fileadmin/PDF/PDF_Intranet_2013/Unternehmensstrafrecht/2013-10-15_Entwurf_zum_Unternehmensstrafrecht.pdf.

6. CORPORATE LIABILITY IN EUROPEAN LEGAL INSTRUMENTS

In order to improve efforts to combat crimes with a typical transnational or international dimension, such as terrorism, environmental pollution and corruption, a number of European instruments, both emanating from the Council of Europe and the European Union, require Member States to provide for corporate liability within their legal systems. However, favouring a pragmatic approach, and taking into account the different doctrinal positions regarding corporate liability, it is left to the individual countries to provide for either criminal or administrative sanctions, as long they are 'effective, proportionate and dissuasive'. For example, Article 9(1) of the Council of Europe Convention on the Protection of the Environment Through Criminal Law (1999) requires States Parties to impose 'criminal or administrative sanctions or measures on legal persons on whose behalf an offence […] has been committed by their organs or by members thereof or by another representative.'[124] It is clear that this, and similar Council provisions adopt the identification doctrine.

The EU legislator favours also derivative corporate liability. For example, in the Council's draft guidelines and model provisions for criminal law,[125] we find a provision that can be found in many other legal instruments:[126]

> '1. Each Member State shall [take the necessary measures to] ensure that a legal person can be held liable for offences referred to in Articles [Article on Criminal

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[122] See: M. Rübenstahl and C. Brauns, 'Trial and Error – A Critique of the New German Draft Code for a Genuine Corporate Criminal Liability' German Law Journal (2015), pp. 871–886.

[123] M. Böse, 'Corporate Criminal Liability in Germany' in M. Pleth and R. Ivory (eds.), Corporate Criminal Liability. Emergence, Convergence and Risk (Springer 2011), p. 250.

[124] Art. 9(1) Convention on the Protection of the Environment Through Criminal Law, CETS No. 172. Similarly, Article 22 of the European Trafficking Convention requires States to establish liability of legal persons for trafficking in the form of criminal, civil and administrative liability.

[125] Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, Brussels, 27 November 2009, 16542/2/09 REV 2.

[126] See for instance: Framework Decision 2002/475 on combating terrorism, OJ 2002 L 164/3; Framework Decision 2005/667 on ship source pollution, OJ 2005 L 255/164; Directive 2008/99

> Offence] where such offences have been committed for its benefits by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person based on […]
> (5) a power of representation of the legal person,
> (6) an authority to take decisions on behalf of the legal person, or
> (7) an authority to exercise control within the legal person.
> 2. Each Member State shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Article [Article on Criminal Offences] for the benefit of that legal person by a person under its authority.
> 3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles [Article on Criminal Offences].'

From this example we can conclude that the European legal instruments base corporate liability upon identifying certain leading natural persons within the corporation who committed the offence for the benefit of the legal entity. In line with the identification doctrine the liability of the organisation is indirect and derivative. The exact scope of the European identification doctrine is however difficult to determine abstractly. The definition of persons in a leading position to be identified with the corporation outlined in the model provision is rather vague. It would at least in theory provide room to also identify persons at lower or medium management levels with the company.[127]

Finally, it is important to note that this provision also broadens the scope of criminal liability by providing that the failure to take supervisory measures can lead to corporate liability as well. This may remedy an overly narrow application of the identification doctrine, as corporate liability may still arise in the event that a non-leading person commits an offence due to a lack of supervision or control by one of the corporation's representatives. This construction very much resembles §130 of the German AOA and introduces a duty for high-ranking employees to properly supervise their personnel. Arguably, such an expansion of liability is to be welcomed as the scope of people to be identified with the corporation should not be too limited, as this can lead to legal lacunas, as we have already seen in the English application of the identification doctrine.

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on the protection of the environment through criminal law, OJ 2008 L 328/28; Directive 2011/36 on preventing and combating trafficking in human beings, OJ 2011 L 101/1. But see also the Council of Europe Criminal Law Convention on Corruption 1999, which provides in Article 18 for a similar detailed provision on corporate liability.

[127] J. Keiler, '*Actus reus* and participation in European criminal law' (Intersentia 2013), p. 464.

7. CONCLUDING REMARKS

The main focus of this chapter was on a comparative overview of some attribution methods for establishing corporate liability for criminal offences. Arguably, legal entities constitute rational agents, pursuing their own goals and policies, which warrants holding them liable if their choices lead to wrongful conduct and harm. For many legal systems there seems to no longer be any principal reason to restrict criminal liability to natural persons of flesh and blood.

We have attempted to show that from a conceptual point of view the inclusion of legal entities in criminal law can be largely based on two different perspectives on corporate liability, depending on whether one decides to take the individual or the organisation as a starting point for the attribution of liability. The nominalist approach views corporations as nothing more than collectivities of individuals. According to this perspective individual wrongdoing remains the focal point of criminal law from which the liability of a legal person is subsequently derived. This approach implies an anthropomorphic view of corporations. How else than through its employees and agents should a legal person act? The conduct of these individuals (act or omission) and states of mind (mens rea) must consequently be attributed to the legal entity. The realist approach, on the other hand, holds that a corporation has an existence relatively independent of its individual members. Rather than viewing corporations as the sum of its individuals, or equating them only with key personnel (the organs of the legal person), it would correspond better to corporate reality to view them as 'living entities or systems' and to devise corporate analogues for human conduct and guilt. For example a corporation may not be at fault in the same way as an individual, but an equivalent could for instance be found in the corporate culture or policy expressing a culpable attitude towards a certain criminal event.

The approach adopted in most European systems shows traces of a nominalist approach, applying variants of the so-called identification doctrine. Likewise, in a variety of European legal instruments we find a derivative view of corporate liability. The shortcomings of the nominalist approach are, however, often remedied by addressing more explicitly the failure to prevent offences from being committed, as we have also seen in the Bribery Act 2010 and the Criminal Finance Act 2017. Nevertheless, there are some interesting developments that point in the direction of a more realist approach. Notwithstanding its weaknesses and its limited scope, the English Corporate Manslaughter Act 2007 shows for example the significant role that a more realistic approach may play in establishing corporate criminal liability. In addition, Dutch case law shows us that it is possible to remedy the limitations of a nominalist model by creating some additional criteria that more accurately reflect the reality of corporate conduct and organisational fault.

Although corporate criminal liability is at present an established concept in most Western legal systems, there are still some exceptions. Some European jurisdictions have no provision for corporate liability at all, while others have created an alternative liability system, like Germany with its Administrative Offences Act. As corporations cannot be bestowed with moral responsibility they cannot incur guilt as would be necessary for the imposition of criminal punishment. According to this reasoning, corporations are thus excluded from criminal law as only individuals can act in a way necessary to justify criminal punishment. However, one should keep in mind that labelling corporate liability as 'administrative' does not negate the evident punitive character of such an alternative liability mechanism. The at times high financial sanctions imposed by German courts warrant regarding the Administrative Offences Act in the light of the pertinent case law of the ECtHR as criminal law. Furthermore, the simple fact that Germany rejects criminal liability of legal entities for purely doctrinal reasons cannot negate the fact that this system is capable of punishing corporations in ways that are similar to countries that do accept corporate criminal liability. The German way of attributing an offence to a legal entity largely resembles the English identification doctrine.

To conclude, we can point out that in the domain of European legal instruments it is also at present a well-established policy that legal entities should be held accountable for their wrongful conduct. The European legislator obliges Member States to ensure that legal persons can be held responsible for offences established by many legal instruments (directives, framework decisions) that are concerned with problems like environmental crimes, terrorism, subsidy fraud, bribery and money laundering. However, it should also be pointed out that the European Union in its legal instruments to this day has merely obliged Member States to recognise a form of corporate responsibility (i.e. leaving the choice of which law to apply, such as administrative law, to the states) but has not yet gone so far as to also require the introduction of corporate criminal liability throughout the Union.

ABOUT THE AUTHORS

Jeroen Blomsma worked as a lecturer in criminal law at Maastricht University from 2006 to 2012. He defended his dissertation 'Mens rea and defences in European criminal law' cum laude in 2012. It was awarded the Modderman Prize for best dissertation in the field of criminal law in 2014. Dr Blomsma has extensive experience in international cooperation in criminal matters. He worked for the Legal Service of Eurojust and for a unit of the Dutch Public Prosecutor's Service that deals with international cooperation in criminal matters. Since 2012, he has been helping develop the European criminal justice area at the Directorate General Justice of the European Commission.

Jacques Claessen is an associate professor of criminal law and criminal procedure in the Faculty of Law of Maastricht University. In 2010 he successfully defended his doctorate thesis *'Misdaad en straf. Een herbezinning op het strafrecht vanuit mystiek perspectief'* ('Crime and Punishment. Rethinking criminal law from a mystical perspective') for which he received the Bianchi Restorative Justice Award in 2012. After obtaining his doctorate he has written several articles on substantive criminal law, criminal sanctions, restorative justice and the position of the victim in criminal law. In 2015 he published a book on the role of forgiveness in criminal law through the implementation of victim-offender mediation. Furthermore, Dr Claessen is editor of the Dutch legal periodical *Nieuwsbrief Strafrecht* (Newsletter Criminal Law) and the Dutch-Flemish legal periodical *Tijdschrift voor Herstelrecht* (Journal of Restorative Justice). He is also an honorary judge at the District Court of Limburg.

Johannes Keiler (Mag. iur., LLM) is an assistant professor in criminal law at Maastricht University. He studied law at the Leopold-Franzens-Universität Innsbruck and at the University of Amsterdam. In 2007 he joined Maastricht University as a PhD researcher and lecturer. In 2013 he defended his dissertation 'Actus reus and participation in European criminal law'. It was awarded the Modderman Prize for best dissertation in the field of criminal law in 2014. Dr Keiler lectures in subjects including comparative criminal law, criminal procedure, European criminal law and cooperation in criminal matters.

Christina Peristeridou is an assistant professor in criminal law at Maastricht University. She lectures in subjects including European criminal law, comparative criminal law, criminal procedure and procedural rights. She studied law at the Aristotle University of Thessaloniki and human rights at the University of Macedonia, Greece. She holds a masters degree in European law from Tilburg University (cum laude) and she is admitted to the Bar of Thessaloniki. In 2015, she defended her dissertation with the title 'The principle of legality in European criminal law'.

David Roef is an associate professor in criminal law and an extraordinary professor in criminal law and neurosciences at Maastricht University. He studied law at the Free University of Brussels. He defended his dissertation '*Strafbare Overheden. Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring*' ('A comparative study on the criminal liability of public legal entities for environmental pollution') cum laude in 2001. It was awarded the J.C. Ruigrok Award in 2004 and the Modderman Prize for best dissertation in the field of criminal law in 2005. Prof. Roef also worked as a researcher for the Dutch parliamentary commission on construction fraud (2002) and has frequently been involved in (comparative) legal research related to environmental criminal law and criminal liability of legal entities. He currently lectures in subjects including comparative criminal law, neurolaw and criminal policy.

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